

**THE
CALCUTTA
LAW JOURNAL.**

REPORTS OF CASES

DECIDED

**BY THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL ON APPEALS
FROM INDIA**

AND

**BY THE HIGH COURT OF JUDICATURE
AT FORT WILLIAM IN BENGAL.**

Gifted by

Sri Pasanti Ballav Sen

—1908—

**NOT EXCHANGEABLE AT
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Vol. VIII.

1908.

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1908.

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A *Babooana* grant of ancestral property by the owner of an impartible estate to enure for the benefit not only of a junior member of the family but of his male descendants in the direct line does not lose its ancestral character by the grant. It does not become self-acquired property in the hands of the grantee or his direct male descendants. Hence the other members of the family have the rights in it which they can claim under the Mitakshara law, that is, the right to restrain alienation except in cases of legal necessity and the right to claim partition: and the original grantee has no power to dispose of the property by Will.

The custom which operates in the case of the Raj itself does not apply to a *Babooana* grant without the requisite proof which is necessary in such cases. The burden of proof lies upon the person seeking to establish the particular custom and to take this out of the ordinary category of Hindu family property.

Per Brett J.—A *Babooana* grant is made to a junior member of the family and to his descendants in the male line for their maintenance. The grant is not of a portion of landed property to pay off a certain fixed sum of money which the grantee is entitled to claim on account of his mainten-

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'Bilmokhta'—Perpetual mokarari lease, construction of—Cess, imposition of additional—Liability—Deed, construction of, rule of—Contracts, construction of, rule of.

It is open to the zemindar and the tenure-holder to contract themselves out of the provisions of section 41 of the Bengal Cess Act,

The word 'Bilmokhta' means, according to agreement, stipulated, fixed, or consolidated.

Under a perpetual mokarari lease a tenure-holder stipulated to pay Rs. 1,585 as the total amount of rent inclusive of abwabs and cesses during the whole period of the continuance of the tenancy. It contained the following word "*yeh Sab Samil us pundrah sao panchasi rupea men hai 'bilmokhta' :*"

Held, that the tenant undertook to pay the whole of the cesses which were levied at the time of contract, inclusive of the share payable by him under the statute as also the share the burden of which would otherwise have to be borne by the landlord himself. If any additional cess is imposed or if the amount of cess is increased, the incidence of the new burden is regulated according to the statute.

When an exemption is claimed from statutory liability, the contract under which exemption is claimed, must be strictly construed against the claimant and it must appear from its terms, beyond the possibility of any dispute, that the parties intended to vary the liability as imposed by the statute. The rule is specially applicable where exemption is claimed from exaction imposed by the State.

The construction to be placed on a deed ought to be such as will render it reasonable rather than unreasonable and will make it just to both the parties rather than unjust to one of them.

In the construction of contracts, Courts may look not only to the language employed but to the subject-matter and the surrounding circumstances; and may avail themselves of the same light which the parties possessed when the contract was made; but this may be done only with a view to interpret the contract and not to contradict it. **Mohanund Sahay v. Saidunnessa Bibi** 525

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Under section 406 of the Calcutta Municipal Act, an inspection of the bustee in which the premises belonging to the petitioner are situate, was made and a standard plan was prepared on a report of a Medical Officer, an officer of the Corporation and an Engineer who was not an officer.

Held, that the plan was not bad in law. The section does not require that Engineer should be a permanent Municipal Officer.

Bengal Municipal Act—Contd.)

Under section 408 of the Calcutta Municipal Act a notice was served upon all the owners of land of a *bustee*. One of the owners objected to a certain proposed road in the standard plan going in a certain direction, on which the Sub-committee decided that the road be deflected and the standard plan thus modified was approved by the General Committee. The petitioner was then served with a notice under section 408 to carry out the improvements according to the standard plan so modified, but was prosecuted for non-compliance.

Held, that the petitioner was not entitled to a fresh notice with regard to the deflection of the road in order to urge her objections to the deflection before the General Committee.

The law contemplates that all persons interested will be present before the Sub-committee and will present not merely their own objections to the scheme but also any objection which they may have to any modification of the scheme on the objections raised by others.

It is not impossible that the deflection of the road may be an improvement on the original plan, but that in itself is not sufficient under the law to invalidate the proceedings of the General Committee if the whole scheme was one calculated to effect a necessary improvement in the land covered by the *bustee*.

The Calcutta Municipal Act gives the General Committee full discretion to proceed either under section 406 or under section 409.

The Sub-committee has power under the Calcutta Municipal Act to sanction any amendment of the original plan even though it be merely to avoid expense and not for the purpose of improving the *bustee*. *Srinati*

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In a suit for rent, the defendant pleaded that the plaintiff was not, during the whole of the period for which the rent was claimed, the owner of all the lands included in the tenancy, as his interest in a portion had been sold at a sale under the Public Demands Recovery Act :

Held, that a decision of the question thus raised was a question relating to the amount of rent annually payable, and an appeal lay against the decree under Sec. 153 of the Bengal Tenancy Act. **Sasi Bhusan Rudra v.**

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Held, (1) that the suit was not barred under section 12 of the Civil Procedure Code ;

(2) that the suit was not barred under section 13, Civil Procedure Code, as A could not join claims for rent and mesne profits in the previous suit.

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Held, that this defence was not open to B as he might and ought to have taken it in the former suit.

Explanation II to section 13 of the Code of Civil Procedure does not lay down that the issue and the subject matter of the two suits must be the same but that the matter directly and substantially at issue must have been directly and substantially at issue in the previous suit. It is not necessary that the subject matter of the two suits should be the same and that the matter of the subsequent should have been heard or have been finally decided by a competent Court in the former suit **Jamadas Singh v. Serajuddin Ahammad Chowdhry** ... 82

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Civil Procedure Code—(Contd.)

It is for the Court of first instance to decide whether the documents which ought to have been mentioned in the original list, or ought to have been produced earlier, were not so produced for good and sufficient reasons.

Section 138 of the Code of Civil Procedure was enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion such as certified copies of public documents or records of judicial proceedings.

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An *ex parte* decree was set aside under section 108 of the Code of Civil Procedure by the Munsiff. A rule to set aside this order was discharged by the High Court. Subsequently on appeal from the final decree, the District Judge set it aside on the ground that the order under section 108 was not proper.

Held, the District Judge had no jurisdiction to consider the propriety of the order, after the discharge of the rule by the High Court.

Held further—It was not open to the plaintiff to challenge the validity of the order in an appeal against the final decree. Section 591 of the Code of Civil Procedure, has no application to such a case. **Mussamut Kariman**

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Per Mookerjee J.—Section 244 of the Civil Procedure Code has no application to a case where the judgment-debtor tries to set aside the effect of the decree itself. In the case of a mortgage decree, the decree itself directs the sale of the property and if objection is taken that the property cannot be sold because it belonged not to the judgment-debtor but to a

Civil Procedure Code—(Contd.)

party who is a stranger to the suit, the propriety of the decree is called in question. A question of this description must be tried in a regular suit and not in the execution proceedings which are based on the assumption that the decree is a good and valid decree. **Shib Lakshan Bhakat v. Srimati**

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Where the mother of a minor is allowed by the Court to act for her son, it is a fair inference that she was appointed guardian by the Court, even though there is no formal order in the record, so appointing her.

Where the Court acts in contravention of Section 443, Civil Procedure Code and overlooking the claims of the certificated guardian appoints somebody else guardian of the minor, it is a mere irregularity.

Even though there be no order which states in so many terms, that the Court has considered the compromise and held it to be for the benefit of the minor, it must be assumed, in the absence of evidence to the contrary, that the Court did its duty in the matter. **Midnapore Zemindari Co. Ltd. v.**

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A compromise of a suit is not one of the acts contemplated in section 29 of the Guardian and Wards Act; hence a certificated guardian can compromise a suit without obtaining the sanction of the District Judge. The statutory provision for safe-guarding the interests of minors in suits is contained in section 462 of the Code of Civil Procedure.

The Court in sanctioning a compromise on behalf of an infant under section 462 of the Code of Civil Procedure, should record the fact the application was made to it by the next friend or guardian, that the terms of the compromise were considered by it, and should in terms state that the question whether the compromise was for the benefit of the infant was considered. From the mere fact that the Court

Civil Procedure Code—(Contd.)

passed the decree in accordance with the compromise, it can not be inferred that any of those steps preliminary and necessary to the making of the decree had been taken by the Court.

Where a decree is passed on adjudication, no separate suit lies to set aside the decree except on the ground of fraud, but where it is passed simply upon a compromise, a suit lies upon grounds other than that of fraud.

Where the minors were defendants represented by their mother and guardian, in the original suit as also in the review petition, and the application for review was discharged with the express direction that the applicant's proper remedy was by way of suit and not by way of review, a suit by the minors through a new next friend, their mother and former guardian *ad litem* being impleaded as a defendant, lies to set aside the decree on grounds other than that of fraud.

• Where the plaintiffs valued their claim in the Munsiff's Court at Rs. 500, and issue was taken on the point, (which if decided in favour of the defendant would have ousted the Munsiff's jurisdiction), but no evidence was adduced there was no waiver of jurisdiction and the High Court can interfere on second appeal. **Biku Halwai v. Mohesh Halwai** ... 266

Sec. 462—Leave of Court, if to be express—Presumption—Compromise decree when to be set aside.

In order that a compromise may be binding upon a minor, the leave of the Court must be express, and further it must be arrived at upon the exercise of judicial discretion as to the propriety of the compromise in the interests of the minor.

• Where a decree was passed without any judicial enquiry or finding as to whether the compromise was for the benefit of the minor, although a formal order of sanction to file the compromise petition was given to an Official of the Court who acted as the minor's guardian *ad litem* :

Held, that the decree was inoperative.

When the Court permits a compromise, it must be presumed in the absence of evidence to the contrary that it gave due consideration to the matter.

Although in appeal a decree made upon a compromise in a suit in which a minor was a party would be held to be invalid as against a minor, it could not, after it had become final and been acted upon, be set aside, unless it were shown to be prejudicial to the minor. **Krishna Pershad**

Roy v. Romesh Chunder Mandol ... 274

Secs. 462, 624, 629—Review order on, if can be questioned in appeal from final decree—Guardian of minor applying to refer to arbitration—Leave or consent of Court if necessary.

Under section 629 of the Code of Civil Procedure, it is open to the appellant on the appeal from the final decree, to take objection to the order passed on the application for review.

A Judge (not being a Judge of the High Court, other than a Judge who delivered the judgment, has no jurisdiction to grant an application for review on the ground that no leave or consent of the Court under section 462 of the Code of Civil Procedure had been given to the guardian *ad litem* to refer the matter in dispute between the parties to the suit to arbitration. **Annada Krishna Dey v. Jogendra Nath Dey** ... 291

Civil Procedure Code—(Contd.)

_____	Sec. 508—Application <i>if to be made by all parties to suit.</i>	
<i>Sanble</i> —Such leave or consent of the Court to the application by all the parties to refer the matter to arbitration is not necessary under section 462 of the Code of Civil Procedure. Annada Krishna Dey v. Jogendra Nath Dey ... 294		
_____	Sec. 509—Arbitration, reference to—Difference of opinion, no provision for, <i>See Award</i> 475	
_____	Sec. 522—Judgment not in accordance with award, <i>See Appeal</i> 475	
_____	Sec. 562—Remand—Preliminary point, what is—Liability for compensation—Amount of damages	
Where by reason of the decision on one or more of the issues recorded in the case there has been no necessity for the consideration of the other issues, the suit was dismissed on a preliminary point. The appellate Court finding that the issues considered were wrongly decided and the suit wrongly dismissed, remanded the case for the disposal of the suit after consideration of the remaining issues :		
<i>Held</i> , the suit was properly remanded under section 562.		
There were two questions in the case <i>viz.</i> , the liability of the defendant to compensate the plaintiffs, and the amount of damages. The Court of first instance held the plaintiffs were not entitled to damages and dismissed the suit on this preliminary point. On appeal, the Court of appeal held the plaintiff was entitled to damages and remanded the suit for ascertainment of damages :		
_____	<i>Held</i> , the remand was proper. Salim Sheikh v. Nazir Khan ... 159.	
_____	Sec. 584—Discretion, erroneous exercise of—Documentary evidence, <i>See Civil Procedure Code</i> , Secs. 59, 63, 138 ... 147	
_____	Sec. 594—Order setting aside <i>ex parte</i> decree, validity of, if can be questioned in appeal from final decree, <i>See Civil Procedure Code</i> , Secs. 591 308	
_____	Sec. 595—Final—Remand order—Decision of issue governing the case—Leave to appeal to privy Council.	
The purchaser of a <i>putni</i> , which was sold for its own arrears, sued the defendants for <i>kh^{as}</i> possession on the ground that they were trespassers after annulment of their incumbrances by notices duly issued under section 167 of the Bengal Tenancy Act. The Court of first instance dismissed the suit on the ground that the plaintiffs failed to prove that the notices were duly issued and served. The appellate Court took the opposite view, holding that the notices had been properly served and remanded the case for the trial of other issues :		
<i>Held</i> , that though the order purported to be only an order of remand, yet as the appellate Court reversed the decision of the first Court upon an issue which governed the whole case, the decree of the appellate Court is a final decree within the meaning of section 595 of the Code of Civil Procedure. Rajabala Debi v. Nuffer Chunder Pal Chowdhury and Ananda Gopal Gossain v. Nuffer Chunder Pal Chowdhury ... 168		
_____	Sec. 622—Charter Act, Sec. 15—Rent Recovery Act, Sec. 153—Revision where appeal lies, <i>See High Court</i> 43	
_____	Sec. 623—Reference by Collector to Civil Court—	

Civil Procedure Code—(Contd.)

Jurisdiction of High Court, <i>See</i> Land Registration Act, Secs. 42, 48, 52, 55	245
_____, Sec. 622—Other remedy open—High Court's power of interference, <i>See</i> Land Registration Act, Secs. 42, 48, 52, 55	245
Common carriers Act —Notice of suit when to be given, <i>See</i> Steamship Company	192
Common Law , right of member to inspect books of the Corporation, <i>See</i> Corporation	103
Compromise , Court's duty in sanctioning—Minor, a party, <i>See</i> Civil Procedure Code, Sec. 462	266
_____, Minor, benefit of—Court not stating the facts, <i>See</i> Civil Procedure Code, Secs. 440, 443	31
_____, petition of, affecting immovable property exceeding Rs. 100 in value—Criminal proceedings, withdrawal of—Order not incorporating terms of petition, <i>See</i> Evidence, admissibility of	90
_____, by trustee, not <i>bona fide</i> —Trustee giving up rights under decree—Breach of trust, <i>See</i> Trustee, suit by	230
_____, Minor—Certificated guardian—Sanction of District Judge if necessary, <i>See</i> Civil Procedure Code, Sec. 462	266
_____, if binding on minor—Formal order—"Benefit of minor" no judicial enquiry as to, <i>See</i> Civil Procedure Code, Sec. 462	274
_____, when binding on minor—Leave of Court to be express—Judicial discretion, <i>See</i> Civil Procedure Code, Sec. 462	274
Consideration —Avoiding legal proceedings, <i>See</i> Reversioners	458
Constable , special, appointment of, when to be made, <i>See</i> Police Act, Secs. 17, 19	66
_____, special—Refusal to serve—Prosecution—Riot or disturbance of the public peace—Ordinary police force, sufficient—Procedure, <i>See</i> Police Act, Secs. 17, 19	66
Contempt of Court — <i>Improper behaviour</i> — <i>Appearance for both parties</i> — <i>Attorney—Firm—Sole partner</i> .	91
An attorney who in the name of a firm of which he was the sole partner appeared on behalf of the plaintiff, also appeared in his own personal capacity for the defendants.	
<i>Held</i> , that he was guilty of contempt of Court and of improper behaviour, and must be suspended. <i>In the matter of Lawrence Wilson</i>	165
Contentious suit —Mortgage suit—Suit for sale on mortgage, <i>See</i> <i>Lis pendens</i>	153
Contingent right , declaration of, suit for, if maintainable— <i>Specific Relief Act (1 of 1877), section 42</i> .	

Per curiam—A person cannot sue for a declaration of his legal right unless he has an existing right, and a mere contingent right which may never ripen into an actual existing right is not sufficient to ground an action for a declaration that the defendant has no right of succession to the property. **Samarendra Chandra Deb Barman Bera Thakur v. Birendra Kishore Deb Barman** ...

Contract —Contravention of section 41 of Cess Act—Landlord and tenure-holder, <i>See</i> Bengal Cess Act, Sec. 41.	525
—, expiry of terms of—Master, option of, become impossible—	
• Magistrate's jurisdiction, <i>See</i> The Workman's Breach of Contract Act, Secs 2, 5	312
—, construction of, rules of, <i>See</i> Bengal Cess Act, Sec. 41	525
Contract Act , Secs. 196, 199—Hindu widow and reversioners—Agency, <i>See</i> Ratification	458

Convenience , balance of—Trial with and of assessors And trial by jury, <i>See</i> Transfer of case	59
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Corporation—*Member of the Corporation*—*Common Law right of the member to inspect books of the Corporation*—*Presidency Banks Act (XI of 1870)*—*Bank of Bombay*—*Shareholder*—*Suit by shareholder against the Bank to enforce inspection of the register of shareholders*—*Allegations of irregularities in the management of the Bank, in the election of its board of directors, in advancing money to directors*—*Object of inspection to communicate with other shareholders*—*Nature of the suit*—*Issue of the writ of Mandamus, principles of, regulating the*—*The right under Statute*—*The same at Common Law*—*Absolute right of inspection*—*Qualified or limited right of inspection.*

"On the application of a member the King's Bench Division will, in general grant a rule for a limited inspection of the documents of the corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question depending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was formerly sometimes laid down broadly, and the language ascribed to the Court in one or two cases might almost lead to the inference that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. But any such doctrine is now exploded; and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object" *Taylor on Evidence, Volume 2^d par. 1495, approved and followed.*

In cases in this country the above principle applies where there is no Statute conferring upon the members of a corporation a right to inspect, copy or take extracts from the register of its shareholders or any other document belonging to it. **The Bank of Bombay v. Suleman Somji** ... 103

Co-sharer landlord collecting his share of rent separately, if constitutes separate tenancy, *See* Putni, purchaser of share of ... 554

— mortgaging other co-sharer's property—Other co-sharer's remedy—Co-sharer redeeming mortgage, *See* Declaration, right to ... 185

— suing for share of rent—Decree, nature of—Sale, effect of, *See* Putni, purchaser of share of ... 554

Costs—*Mortgage decree*—*Decree for costs, if part of*—*Other properties*—*Transfer of Property Act (IV of 1882), Sec. 90.*

A decree for costs is a part of the mortgage decree and in execution of such decree, the mortgaged properties must first be sold and only if such sale does not satisfy the whole decree, can the other properties of the mort

Costs—(Contd.)

gagor be proceeded with in the manner laid down in section 90 of the Transfer of Property Act. **Rajkumar Singh v. Sheo Narain Sha** ... 152
Court, duty of—Parties, rights of—Plaint, filing of.

The Civil Courts must adjudge on the rights of the parties as they existed when the plaint was filed and not on any title subsequently derived.

Purkhit Panda v. Ananda Gaontia .. 116

— Pending proceeding—Criminal Procedure Code, Secs. 94, 105, 165,

See House Search ... 75

Court's duty in sanctioning compromise—Minor, a party, *See* Civil Procedure Code, Sec. 482 ... 266

Court-fee—Declaration, suit for, that a decree was fraudulent—Further relief—Specific Relief Act, Sec. 42 Provision—Plaint originally correctly framed—Unfounded objection—Withdrawal of prayer for consequential relief—Dismissal of suit—Second appeal—Plaint, amendment of and restoration to original form

It is necessary for the plaintiff to ask not only for a declaration that a decree obtained against him was fraudulent but also for a consequential relief, viz., either to have the fraudulent decree set aside or to have a perpetual injunction granted to restrain the decree-holder from executing it.

A suit for a declaration that a decree obtained against the plaintiff was fraudulent, with a consequential relief, should ordinarily be valued at the amount for which the decree sought to be set aside was obtained.

Where the plaint was originally correctly framed, but by reason of an unfounded objection as to deficiency of Court fees taken by the defendant, the plaintiff withdrew his prayer for consequential relief, which resulted in the dismissal of the suit on the ground of its not being maintainable, the High Court in second appeal allowed the plaint to be amended and restored to its original form. **Thakur Prosad alias Shumboo Narain v. Punkal Singh** ... 485

Criminal Procedure Code, Sec. 94—Accused called upon to produce incriminating document, liability of, *See* Indian Penal Code, Sec. 175 ... 320

—, Secs. 94, 105, 165—Court—Pending proceeding,

See House Search ... 75

—, section 107—No Evidence—Party agreeing to be bound down—Order without jurisdiction.

No person can be bound down under section 107 of the Criminal Procedure Code without any evidence being recorded that he is about to commit a breach of the peace, even though he may agree to be bound down.

Ram Chandra Halder v. The Emperor ... 68

—, Secs. 107, 443—Security for keeping peace—European British subject—Magistrate, who may enquire.

The expression "inquire into or try any charge" in section 443 of the Code of Criminal Procedure applies to proceedings under section 107 of the Code.

The party against whom proceedings under section 107 of the Code of Criminal Procedure are instituted, is in the position of an accused person.

Bhom Lal Chowdhury v. Mr. R. P. Hoperoff ... 565

Criminal Procedure Code—(Contd.)

_____	Sec. 122—Security for good behaviour—'Unfit'—Discretion of Magistrate.	
•	The 'unfitness' of a surety under section 122, Criminal Procedure Code, is not limited to pecuniary unfitness.	
	The question as to whether a particular person is 'fit' or not is for the Magistrate to decide. The matter is left to his discretion, which is not fettered in any way. <i>In re Jalil</i> ...	243.
_____	Sec. 145—Jurisdiction—Notice, want of—No written statement called for—No opportunity to adduce evidence.	
	A Magistrate has no jurisdiction to pass an order under section 145 of the Criminal Procedure Code without giving notice to the parties, without calling for written statements from them and without giving an opportunity to cite witnesses or to put in documentary evidence. <i>Sujjad Ahmed Chowdhury v. Parbati Charan Roy</i> ...	71
_____	section 145—Division of crops—Magistrate, jurisdiction of.	
	A Magistrate has no jurisdiction to order a division of the crops on the land, subject matter of proceedings under section 145, Criminal Procedure Code, between the parties. <i>Ram Narain Sahu v. Kailash Singh</i> ...	242
_____	section 145—Proceedings, adjournment sine die—Legality.	
	It is not legal for a Magistrate to adjourn proceedings under section 145 of the Criminal Procedure Code <i>sine die</i> pending settlement of the tract under Regulation VII of 1882. <i>Abdul Rauf Mia v. Rahamuddi</i> ...	594
_____	Sec. 437—Further enquiry—Notice to accused.	
•	An order under section 437 of the Criminal Procedure Code made without notice to the person proceeded against is bad. Such notice and an opportunity to shew cause why the order should not be made, can be given without impropriety after such person has been arrested and brought before the Court.	
_____	<i>Giridhari Marwari v. Emperor</i> ...	78
_____	section 528—Transfer of case by District Magistrate—Case remanded by Sessions Judge—Notice to accused person.	
	The District Magistrate has no jurisdiction to transfer a case from the file of a Subordinate Magistrate to whom it has been remanded by the Sessions Judge for further enquiry and less so, if he gives no notice to the other side. <i>Akhil Dome v. Ram Chandra Mandal</i> ...	241
_____	Withdrawal of—Compromise, affecting immovable property exceeding Rs. 100 in value—Petition if to be registered, See Evidence, admissibility of ...	90
	Crops, division of, order for—Magistrate's jurisdiction, See Criminal Procedure Code, Sec. 145 ...	242
	Custom—Burden of proof, See Babooana grant ...	124
_____	Mutt—Succession—Nomination—Election, See Mohunth ...	499
	Damages, amount of—Compensation, liability for, See Civil Procedure Code, Sec. 562 ...	159
	Dastak giving possession and right to cultivate—Registration Act, Sec. 17(d), See Admissibility ...	535

Daughter , nature of estate taken by—Gift to daughters and their respective sons—Share of a daughter dying "without leaving any male issue surviving" to go to the surviving daughter and her sons—Share of a daughter dying leaving sons to go to her son or sons—Intention of the testator, exclusion of daughter's daughters—Indian Succession Act, Sec. 82, <i>See</i> Hindu Law, Will	48
Dayabhaga —Srikrishna and Raghu Nandana, authorities of Bengal, <i>See</i> Stridhan	200
Dayabhaga , binding character—Verses 32 and 33—'Of the rival wife'—Interpolation, <i>See</i> Hindu law—Shebaitship	369
Declaration , by a deceased member touching family reputation or tradition, <i>See</i> Pedigree	447
—, <i>right to</i> —Rights in property affected—Subsequent conduct of defaulter. Where one of the shareholders of a property purported to mortgage the whole estate. <i>Held</i> , the other share-holders had a right to the declaration that the defendant could not alienate their share, and this, notwithstanding that subsequently to the suit the defaulter had paid off the mortgage debt. Sonabhan Bibi v. Nathmal Kerasi	185
— by deceased member— <i>Post litem motam</i> , <i>See</i> Pedigree	447
Declaratory decree — <i>Setting up Wakf</i> —Defendant failing to establish title. In a suit by a purchaser for a declaratory decree where a <i>wakf</i> is set up by the defendant who claims the land as the <i>mutwalli</i> but fails to establish his title, if the plaintiff has made out a <i>prima facie</i> title, he is entitled to a declaration of his title and an injunction. Satish Chandra Mullick v. Ashruffudin Ahmad	196
— No issue as to liability of taluk to enhancement, <i>See</i> Regulation, Bengal Decennial Settlement, Sec. 51	329
Decree , conditional, giving possession till a Mohunth is duly installed, validity of, <i>See</i> Mohunth	499
— effect of, setting aside of—Execution, <i>See</i> Civil Procedure Code, Secs. 244, 280.	20
—, fraudulent—Suit to set aside—Suit for declaration and for consequential relief, <i>See</i> Court fee	485
— of first Court, if binding pending appeal, <i>See</i> Trustee, suit by	230
— for costs, part of mortgage decree, <i>See</i> Costs	152
— on compromise became final and acted upon, if can be set aside—Minor, prejudicial to, <i>See</i> Civil Procedure Code, Sec. 462	274
—, suit to set aside—Decree passed on adjudication—Fraud, <i>See</i> Civil Procedure Code. Sec. 462	266
—, suit to set aside, on grounds other than fraud, maintainability of, <i>See</i> Civil Procedure Code, Sec. 462	266
—, in partition suit, if binding on mortgagees not a party— <i>Estoppel</i> —Mutualty. The judgment and decree in a suit for partition, to which a prior mortgagee is not made a party are not binding upon the mortgagee. The mortgagee in such a case can not take advantage of any finding in the said judgment. The estoppel must be mutual. Surja Prosad Thakur v. Rajmohan Topedar	478

Deed , construction of, rules of, <i>See</i> Bengal Cess Act, Sec. 41	525
Defences , alternative, when allowed—Owner and right of easement— Plaintiff not allowed to object in appeal, <i>See</i> Easement	289
Defence alternative—Tenant, <i>See</i> Possession, suit for	557
Direction , land actually acquired not mentioned in—Proceedings void— Reference to Civil Court, <i>See</i> Land Acquisition Act	39
Disagreement between Judge and assessors, <i>See</i> Retrial	59
Discretion , erroneous exercise of—Documentary evidence, reception of— Second appeal, <i>See</i> Civil Procedure Code, Secs. 59, 63, 138	147
— of Magistrate—Unfitness of surety—Security for good beha- viour, <i>See</i> Criminal Procedure Code, Sec. 122	243
Document , incriminating—Accused, liability of, to produce, <i>See</i> Indian Penal Code, Sec. 175	320
Documents , when to be filed, <i>See</i> Civil Procedure Code, Secs. 59, 63, 138	147
Drawer , liability of—Hundi payable at sight—Unconditional acceptance— Holder arranging payment with acceptor—Notice of dishonour, omission to give, <i>See</i> Negotiable Instruments Act, Secs. 30, 39, 86	163
Easement —Way, right of—Implied grant—Alternative defences—No objection—No prejudice.	

No grant of an easement can be implied from a defendant using a land for eight years without any objection on the part of the plaintiff.

Per Mookerjee J—There is no implied reservation of an easement in case one transfers a part of his land over which he has previously exercised a privilege, in favour of the land he retains, unless the burden is apparent, continuous and strictly necessary for the enjoyment of the land retained.

Implication of grant of easement, upon the severance of a tenement, extends to a way which is a formed or metalled road.

It is open to a defendant to set up alternative defences, e. g. to set up as a defence, that he was the owner of the property in dispute and if he was not the owner, he had a right of easement over it.

A plaintiff will not be allowed to raise any objection as to defendants' setting up alternative defences, at the appellate stage of the suit, when no such objection was raised in the Court of first instance and it was not shown that he was in any way prejudiced. **Purnendu Narain Roy v.**

Dwijendra Narain Roy 289

Ejectment, suit for—Burden of proof—Tenure, hereditary character of, absence of words importing—Presumption—Permanency of holding—Mutation potta containing no words importing permanency of holding, if destroys permanent tenancy—Mutation made in substitution of heirs—Confirmatory potta.

Where the plaintiff claims to eject the defendants from the land on the ground that they are merely tenants-at-will, the onus lies on the defendants to substantiate that they have a permanent interest in the land.

The absence of words importing the hereditary character of the tenure may be supplied by the evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son, where that hereditary character may be legally presumed.

In a case where the following facts were found, viz, the possession at a uniform rent for some hundred years, the property descending from father to son, various

Ejection—(Contd.)

transfers, many of them recognised, by the landlord, the erection of *pucca* buildings, the improvements at much cost, and all this with the knowledge of the landlord's agents and no attempt to eject or to enhance the rent for all those years, the presumption of the permanency of the holding may legally be made.

A permanent tenancy is not destroyed by the acceptance by a purchaser of the holding of a mutation *potta* containing no express words importing the permanency of the holding.

The words "Mutation is being made in substitution of the heirs of Bhagwan" in the mutation *potta* mean, that the *potta* was executed not for the purpose of destroying the old permanent tenure and creating a tenancy-at-will, but simply with the object of effecting a mutation of names in the proprietor's sherista.

Where a mutation *potta* refers to an old *potta* creating a permanent holding, for the purpose of showing a proportionate rent and treats the taker as the then existing tenant and not creating him a new tenant by virtue of that *potta*, that *potta* is a confirmatory one. **Ismail Khan**

Mahomed v Nani Gopal Mukerji ... 513

—, suit for—Factory Zerai—Absence of evidence of khas possession—Proprietor's private land—Area exceeding 100 bighas—Presumption, rebuttable—Bengal Tenancy Act, Secs. 5(5), 120—Raiyat holding over—Trespasser—Notice to quit, if necessary—Tenancy, determination of.

Indigo zerai lands, in the absence of evidence to show that the lands were ever in the khas possession of the landlord, or their ancestors, do not come within the definition of proprietor's private lands contained in section 120 of the Bengal Tenancy Act.

The presumption arising under section 5 (5) of the Bengal Tenancy Act is a rebuttable one.

A raiyat of at least 10 years' standing and now holding over is not a trespasser and cannot be ejected until his tenancy has been determined by a notice to quit or in some other legal manner. **H. B. Dalgilish v. Damodar**

Narain Chowdhury ... 533

—, suit for, non-maintainability—Nature of tenancy—Appeal by plaintiff and defendant—Procedure, *See* Suit ... 552

—, suit for—Gaontia, a proprietor, *See* Central Provinces land Revenue Act, Secs. 4(8a), 152 ... 116

—, Sub-lease, grant of, by tenant—Central Provinces Tenancy Act (XI of 1898), Sec. 46-Sub-sec. (3).

Under the Central Provinces Tenancy Act, none but an occupancy tenant can be ejected from his holding for granting a sub-lease. **Sadasib Jhemkir**

v. Jala Gaontia ... 156

English Law of mortgage, if applicable—Landlord purchasing in execution of money decree, if, can question transferability, *See* Occupancy holding ... 29

Enquiry into or try any charge—Security for keeping peace—European British subject; *See* Criminal Procedure Code, Secs. 107, 443 ... 565

Entry in settlement record, presumption, evidence—Central Provinces Tenancy Act (XI of 1898), Sec. 2(10)—Holding of a survey number.

The entry in the settlement record is not conclusive; it is only a matter of presumption.

Entry—(Contd.)

The holding of a survey number in section 2 (10) Explanation II of the Central Provinces Tenancy Act has reference to the holding when the proceedings in a Civil Court are initiated, and it cannot avail a person that in a subsequent settlement he was recorded as a tenant. **Purkhit Panda**

c. Ananda Gaontia 116

Equity of redemption: of one of the mortgagors, purchase of, by mortgagee—Mortgage amount, suit for realisation of—Share of debt to be deducted.

A mortgagee purchasing the share of one of his mortgagors is bound to give credit for that which his vendor would have been liable to pay and not the full value of the share purchased **Mutty Lall Pal c. Nunda Lall**

Neogy 92

Estoppel—Evidence Act, Sec. 115, if exhaustive, See Occupancy holding ... 29

——— Mutuality, *See Decree* 478

——— Previous application barred—Notice on judgment-debtor.

A judgment-debtor is not estopped from contending that a previous application for execution was barred by limitation merely because notice had been served on him and he did not appear to contest the proceedings.

Umed Ali c. Abdul Karim 193

European British subject—Security for keeping peace—Criminal Procedure Code, Sec. 443, applicability of—“Enquiry into or try any charge,

See Criminal Procedure Code, Secs. 107, 443 565

Evidence—Father reversionary heir—Ancestral land, See Oguk ... 350

———, recording of, by one Judge and passing of orders by another,

validity of, *See Sessions Judge* 50

———, admissibility of—Compromise, petition of—Criminal proceedings, withdrawal of—Order not incorporating terms of petition.

On account of some dispute between the parties which resulted in criminal proceedings, a petition was presented in those proceedings and in consequence they were withdrawn but no order was passed incorporating the terms of the petition.

A suit for increased rent was afterwards brought by one of the parties against the other on the basis of the petition.

Held: that the petition being unregistered and affecting immovable property exceeding Rs. 100 in value, was not admissible in evidence.

Biraj Mohini Dasi c. Kedar Nath Karmokar 90

Evidence Act, Sec. 32 cl. (b)—Dispute, nature of, at the time of drawing up—Admissibility, See Pedigree 447

———, Sec. 115, if exhaustive, *See Occupancy holding* ... 29

Family Settlement, principle of—Arrangement between parties interested in the property—Validity—Prejudice, *See Reversioners* ... 458

Final decree—Remand order—Decision of issue governing case—Leave to appeal to Privy Council, See Civil Procedure Code, Sec. 595 ... 168

Forfeiture—Voluntary alienation—Re-entry, right of, See Grant, construction of 188

Forgery—Receipt for documents—Dishonestly or fraudulently using as genuine a forged document, See Indian Penal Code, Sec. 471 ... 317

Fraud—Pleadings—Full particulars.

- Per Ryces J.*—It is incumbent on a party, be he plaintiff or defendant, who seeks to avoid a contract on the ground of fraud or undue influence, to give in his pleadings full particulars of the circumstances on which he relies as the basis of his plea. It is not enough to boldly assert that, fraud or the like vitiated the contract. **Raja Promada Nath Roy Bahadur v Kinoo Mollah, alias Kala Mia** ... 135

- Gaontia**, a proprietor—Ejectment, suit for, *See* Central Provinces Land Revenue Act, Secs. 4 (84), 152 ... 116

- General Committee**—Discretion, *See* Bengal Municipal Act, Secs. 400, 406, 409 ... 507

- Gift** to daughters and their respective sons—Share of a daughter dying "without leaving any male issue surviving" to go to the surviving daughter and her sons—Share of a daughter dying leaving sons to go to her son or sons—Intention of the testator, exclusion of daughter's daughters—Nature, of estate taken by each daughter—Indian Succession Act, Sec. 82, *See* Hindu Law, Will ... 48

- Gochur lands**—Common lands, *See* Central Provinces Land Revenue Act, Secs. 4 (8a), 152 ... 116

Grant—Construction of—Forfeiture—Right of re-entry.

T granted a *miras taluq* to his widowed daughter at a rent, for her life and on her death, to her adopted son, if she adopted one, for life, and after him to his sons, grandsons &c., by right of inheritance, in the male line, but without any power of alienating the property. In case the grantee adopted no son or her adopted son died without any heir in the male line the property was to revert to the grantor or his representative. It was also provided that the property could not be attached or sold for any debt incurred by the grantee or her adopted son, grandson &c. In case of attachment or sale, it would be void and the property would come into the *khas* possession of the grantor or his representative :

Held, the grant did not create an absolute estate in the daughter. At the same time the grantor had no right to re-enter in case of a voluntary alienation. That right was limited to case of attachment or sale.

When therefore the grantee made a gift of the property to her adopted son,

- Held*, the gift was void, but the grantor or his representative could not obtain *khas* possession of the property **Dharani Kanta Lahiri Chaudhuri v. Shiba Sundari Debbya** ... 188

- Guardian**—Mother acting for her son—No formal order appointing her, *See* Civil Procedure Code, Secs. 440, 443 ... 31

- and Wards Act, Sec. 29—Compromise—Minor—Certified guardian—Sanction of District Judge, if necessary, *See* Civil Procedure Code, Sec. 462 ... 266

- Heir**—Daughter's and rival wife's sons—Ayautuka stridhan—Inheritance, *See* Hindu Law—Shebaitship. ... 369

- High Court**, power of—Act X of 1859, Sec. 153—Civil Procedure Code (Act XIV of 1859), Sec. 622—Charter Act (24 and 25 Vict. C. 104), Sec. 15—Revision where appeal lies.

The High Court has power, notwithstanding section 153 of Act X of 1859, to revise the orders of lower Courts where they have not acted correctly according to law under section 622 of the Civil Procedure Code or under section 15 of the Charter Act.

High Court—(Contd.)

Where the application is not merely to set aside the order of a Deputy Collector, but also the appellate order of a Collector, the Court can properly interfere under section 622, Civil Procedure Code. **Mohunt Gobinda**

Ramanuj Das v. Lakhun Parida

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Hindu Law—Widow, alienation by, without legal necessity—Consent of female reversioners—Alienee, nature of estate taken—Proper purpose—Presumption.

Per curiam. The consent of a female reversioner to the sale by a Hindu widow without legal necessity does not bind or affect the reversioner who takes an absolute estate. The alienee gets only the qualified estate of the alienor.

Such consent does not raise a presumption of law that the purpose for which it was made was proper. **Bepin Behari Kundu v. Durga Charan**

Bandopadhyaya..

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Hindu Law—Will, construction of—Hindu widow—Dedication of property to idol, if valid—"Malik," meaning of—Words, if imply absolute ownership—Limited grant, if and when effective—Suit for declaration of property to be debutter.

The effect of the word "malik" is to confer on the donee a heritable and alienable estate

But the effect of the word "malik" may be modified by the context, or in other words, in order to cut down the full proprietary rights that the word imports, something must be found in the context to qualify it

The Court must, in construing a will, look to all the clauses of the Will, and give effect to all the clauses, ignoring none as redundant or contradictory.

Held on a construction of the Will in the present case, that there is ample indication in the context to displace the presumption of absolute ownership implied in the word "malik" and to justify the conclusion that the gift in favour of the widow must be cut down to something less than a full proprietary right with power of alienation; that it is impossible to maintain that any absolute devise was made to her, that she took a limited estate under the Will, that so far as the Will is concerned her powers of alienation were confined to the dedication of property for the benefit of the ancestral idol, and the alienation of the property in case of necessity; and that the dedication to a new idol she has established or installed is invalid and the dedicated property is not debutter. **Shib Lakshan**

Bhakat v. Srimati Tarangini Dasi

20

Will—Construction, consideration for.

In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate **Radha Prosad Mullik v. Ranimoni Dassi**

48

Shebaitship, inheritance to—Lunatic, right of inheritance of—Dayabhaga, authority of—Dayabhaga, Chap IV, Sec 3, V. 31, 32, 33, spurious—Rival wife's son and daughter's son—Stridhan, ayautuk.

In the absence of any directions to the contrary in the will, the right of inheritance to the shebaitship follows the same line as the right of inheritance to immovable property.

Hindu Law—(Contd.)

In Bengal, insanity at the time when the inheritance falls in, is sufficient for exclusion from the succession, even though the lunacy may not have been congenital; and where the succession to an office is in question, the duties attached to which require that the holder shall be in full possession of his senses, lunacy is undoubtedly sufficient to disqualify a person from succeeding.

The text of the Dayabhaga by Jimut Vahana cannot be regarded as in itself an authority absolutely binding without any regard to the fact whether the doctrine propounded in the text has been accepted as a true exposition of the law and has been sanctioned by usage, and without any consideration of the question whether a verse relied upon bears on its face the evidence of being spurious and an interpolation.

Verses 32 and 33 and the words "of the rival wife" in verse 31 in Sec. III of Chapp. IV of the Dayabhaga are interpolations and are spurious.

The son of a rival wife is not a preferential heir to the daughter's son in the line of succession of the *ayaturu* stridhan property of a Hindu female.

The destruction of an image does not destroy the endowment. **Purna**

Chandra Bysack v. Gopal Lal Sett

... 369

— Will—Gift to daughters "and their respective sons"—Share of a daughter dying "without leaving any male issue surviving" to go to the surviving daughter and her sons—Share of a daughter dying leaving sons to go to her son or sons—Intention of the testator, exclusion of daughters' daughters—Nature of estate taken by each daughter—Indian Succession Act (X of 1865), Sec. 82.

Where the only question raised upon the appeal was as to the nature of the estate which, in the events which had happened, the testator's daughters took under the clause of the will of a Hindu inhabitant of Calcutta viz, "I desire and direct my executors to make and divide the whole of my estate, both real and personal, unto and between my daughters in equal shares, to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving but leaving my other daughter or surviving then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons share and share alike."

Held, that the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons, and that, in the events that had happened, the daughters of the testator were entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves.

Held also, that by the gift to his daughters "and their respective sons," and by the proviso that in the event of one of the daughters dying "without leaving any male issue surviving" the share of the deceased daughter was to go to the surviving daughter and her sons, to the exclusion in both cases of female issue, the testator had clearly succeeded in showing that his daughters, whom he incontestably intended to benefit, were not to have more than what was generally known to be a woman's estate in his property; and that no language could more clearly show than the language of the clause, "in the case of the death of either daughter leaving sons, the share of such daughter to be paid to such her son or sons share and share alike," that the intention of the testator was to exclude his daughters' daughters from the succession, to which they would have been entitled under the ordinary Hindu Law, if their mother's estate had been absolute.

Hindu Law—(Contd.)

With reference to the contention that under section 82 of the Indian Succession Act (X of 1865) the daughters took an absolute estate;

Held, that, under the terms of the will, only a restricted interest was intended to pass to a daughter dying without male issue **Radha Prosad**

Mullik v. Ranimoni Dassi ... 48

Hindu Widow—Alienation by surrender or by conversion into annuity

—Consent of reversioners—Transferee, right of, *See* Reversioners ... 458

—Alienation of portion of estate—Consent of next reversioner—*Validity*.

An alienation by a widow of a portion of her husband's estate is valid if made with the consent of the next reversioner. The principle is not restricted to the case of alienation of the whole of the property. **Pulin Chandra**

Mandal v. Balai Mandal ... 280

—Alienation—Re-marriage—Purchaser, status of—*Reversioner, remedy of*.

If a transfer is made by a Hindu Widow for legal necessity and before her re-marriage, the position of the purchaser from the widow remains unaffected by her subsequent marriage. Unless the transfer was for legal necessity, it can not bind the reversionary heir who will be entitled to take the property from the purchaser after the death of the widow or after she had forfeited her estate by reason of her re-marriage

Quære—Whether on principle an unauthorized alienation by a widow ought to be allowed to subsist beyond the extinction of her own title which alone could pass to her transferee. **Nitya Madhav Das v. Srinath**

Chandra Chuckerbutty, ... 542

—, lease by—Beneficial arrangement—Not prejudicial to the reversioners—Conversion of interest into annuity—Family settlement, principle of, *See* Reversioners ... 458

—Maintenance—Grant to idols—Construction of will—

Questioning grant, validity, *See* Will ... 489

—Reversioners—Agency, *See* Ratification ... 458

—Residence, restriction as to—Non-compliance—'Just cause,' *See* Will ... 489

—Maintenance, amount of, if can be limited by will, *See* Will ... 489

—*See* Will ... 489

Holding, permanency of—Hereditary character, absence of words impor-

ting—Presumption, *See* Ejectment, suit for ... 513

—, sub division of—Purchaser, rights of—Landlord's title not ques-
tioned, *See* Bengal Tenancy Act, Sec. 88 ... 161

House search—*Indian Arms Act* (XI of 1878), section 25—*Code of Criminal Procedure* (V of 1898), sections 95, 105, 106—*Judicial Officers Protection Act* (XVIII of 1850), section 1.

The defendant who did not, before causing the search of the plaintiff's house to be made, first record the grounds of his belief as provided for by section 25 of the Arms Act, could not justify the search under the provisions of the said act.

As there was no proceeding pending before him, the defendant was not a 'Court' within the meaning of section 94 of the Code of Criminal Procedure, and therefore the defendant could not direct a search to be made in his presence under the provisions of section 106 of the Code.

House search—(Contd.)

The search having been for the purposes of discovering arms generally, section 165 of the Code did not apply.

Conducting a search for arms is not an act done in discharge of a judicial duty. Act XVIII of 1850 (Judicial Officers Protection Act) does not apply to such a case.

Even where a defendant's *bona fides* in conducting a search is established it does not release him from the obligation the law casts upon him as being in supreme control of the search party from seeing that the search was conducted in a proper and reasonable manner. In such a case the damages should be substantial and not merely nominal. **Brajendra Kishore Roy**

Chowdhury v. Clarke ... 75

Hundi, payable at sight—Unconditional acceptance—Holder arranging

• payment with acceptor—Notice of dishonour, omission to give—Drawer,

liability of, *See* Negotiable Instruments Act, Secs. 30, 39, 86.. 163

Idol, new, dedication of, if valid, *See* Hindu Law, will ... 20

Impertible estate—Junior members, *See* Babooana grant ... 124

Incumbrances, suit to avoid—Purchaser from purchaser at revenue sale—

Putnidar, *See* Right to sue ... 177

Indian Arms Act, Sec. 25—Belief, grounds of, recording of, condition precedent, *See* House search ... 75

Indian Contract Act, Secs. 59, 60, *See* Land revenue ... 41

—————, Secs. 191, 192—Receiver appointing tehsildar, *See* Accounts, suit for ... 114

Indian Penal Code, *Sec.* 147—Rioting—Common object—No express finding—

No question as to common object—Prejudice.

Where the common object of an unlawful assembly is clearly set out in the charge and there is no question in the lower Courts as to the common object so set out, a conviction for rioting with the object set out is good even though there might be no express finding as to the common object, if the accused has not been in any way prejudiced by the absence of such finding. **Dasarathi Mahapatra v. Raghu Sahu** ... 69

—————, Secs. 149, 300, exception 4—Sudden fight—Private defence—**Murder**—Unlawful assembly—Common intention—Criminality varies.

When the accused's party pursued the complainants in three boats for a long distance and then when they had them in their power landed and attacked them with spears and killed three of them, their action does not come within exception 4 to section 300 and certainly amounts to murder.

There is no right of private defence against persons who are merely taking refuge in the offender's land from other persons trying to take their lives.

Members of an unlawful assembly may have a common object only up to a certain point and the criminality of each varies according to the information at his command and also to the extent to which he shares the community of object. The effect of section 149 may be different on different members of the same unlawful assembly. **Adil Mohamed v.**

The Emperor ... 561

—————, Sec. 149, effect of, on different members—Unlawful assembly—Common intention, *See* Indian Penal Code, Secs. 149, 300

Exception 4 ... 561

Indian Penal Code—(Contd.)

—————, *Sec. 175—Intentionally omitting to produce a document—Accused person—Incriminating document—Liability to produce—Criminal Procedure Code (Act V of 1898), Sec. 94.*

An accused person cannot be called upon, under section 94 of the Criminal Procedure Code, to produce a document which would incriminate himself. His failure to do so is not an offence under section 175 of the Indian Penal Code. **Iswar Chandra Ghoshal v. The Emperor** ... 320

—————, *Sec. 471—Dishonestly or fraudulently using as genuine a forged document—Dishonest or fraudulent intention—Receipt for documents actually found—Forgery.*

Accused was charged with having fraudulently or dishonestly used a document which purported to be a receipt granted to him by the manager of a Ward's Estate for certain papers, and which receipt was alleged to be false. Subsequently, some of the papers mentioned in the receipt were found in the estate office, while the other papers had not been searched for.

Held, that these facts were not sufficient to show that user of the document was fraudulent or dishonest or that the accused had committed any offence.

Held further: If the papers had actually been deposited in the office and the accused had subsequently prepared a false receipt for them, it would not be forgery. **Ram Prosad Maity v. The Emperor** ... 317

Indian Succession Act, Sec. 82—Gift to daughters and their respective sons—Share of a daughter dying "without leaving any male issue surviving" to go to the surviving daughter and her sons—Share of a daughter dying leaving sons to go to her son or sons, See Hindu Law, will ... 48

Injunction—Plaintiff proving prima facie title—Defendant failing to establish title, See Declaratory decree... ... 196

Inspection, absolute right of—Qualified or limited right, See Corporation... ... 103

Jhum Cultivation, nature of—Permanent Settlement—Assessment See Regulation III of 1891 ... 436

Judge, change of—Recording of evidence by one and passing orders by, another, validity of, See Sessions Judge ... 59

Judge and Assessors, disagreement between, See Retrial ... 59

Judgment, loss of—Re-writing from memory—Civil Procedure Code, See exhaustive.

Where a judgment has been lost, it is open to the Judge to re-write from memory the substance of it. It cannot be expected that the Civil Procedure Code would provide for such a contingency. **Narsingh Narain Singh v. Harkhu Singh** ... 521

Judicial Officers Protection Act, Sec. 1—Judicial duty—Conducting search for arms, See House search ... 75

Jurisdiction—District Judge, if can question the propriety of order setting aside *ex parte* decree—Rule to set aside the order discharged by High Court, See Civil Procedure Code, Secs. 108, 591 ... 308

—————, District Judge transferring a case withdrawn from the file of Subordinate Judge to his own file and then transferring to that of

Jurisdiction.—(Contd)

Additional District Judge, <i>See</i> The Bengal, N. W. P. and Assam Civil Courts Act, Secs. 9, 22	...	...	...	34
— of a Judge other than the Judge delivering judgment, to grant an application for review on ground that no leave or consent of Court under Sec. 462, had been given, <i>See</i> Civil Procedure Code, Secs. 462, 624, 629	...	...	...	294
—, order without—Party agreeing to be bound down—No evidence, <i>See</i> Criminal Procedure Code, Sec. 107	...	...	...	68
— of Magistrate to order division of crops, <i>See</i> Criminal Procedure Code, Sec. 145	...	...	...	242
— Want of notice—No written statement called for—No opportunity to adduce evidence, <i>See</i> Criminal Procedure Code, Sec. 145	...	...	...	71
— of Magistrate—Expiry of terms of contract—Master's option became impossible, <i>See</i> The Workman's Breach of Contract Act, Secs. 2, 5	...	...	...	312
— of Civil Court— <i>Succession to property lying within British territory, dispute as to—Hill Tipperah Raj.</i>				
<i>Held</i> , (Doss J. dubitante).—The appointment of Jubraj by the Raja of Tipperah is an act of State by a Sovereign Prince and the Municipal Courts cannot question the validity of that appointment. Samarendra Chandra Deb Barman Bara Thakur v Birendra Kishore Deb Barman				
—, question of, when entertainable in appeal—Civil Court's jurisdiction when ousted.				1
If the question of jurisdiction depends for its determination upon facts not found by the lower Courts, an appellant cannot ask the High Court to find them; the appellant must substantiate his contention if he can, on the facts already found. If he is unable to point to any facts in respect of his plea, that plea must fail.				
The ordinary Civil Courts cannot be ousted of their jurisdiction in the absence of an express provision of law to that effect. Purkhit Panda v. Ananda Gaontia				
Kabuliyat , execution by several persons—One cannot avoid—All not questioning, <i>See</i> Undue influence	...	...	...	116
—, — Landlord and tenant—Dominating will, <i>See</i> Undue influence	...	...	...	135
" Kanya ", meaning of—Dayabhaga, Chap. IV, Sec. II, para 16, <i>See</i> Stridhan	...	...	...	200
Land , transfer of part of—Implied reservation of easement—Enjoyment of land retained, <i>See</i> Easement	...	...	...	289
—, using for eight years—Grant of easement—Implication, <i>See</i> Easement	...	...	...	289
Land Acquisition Act —Declaration—Land actually acquired not mentioned—Reference to Civil Court.				

When land actually taken up by Government is different from that mentioned in the declaration issued under the Land Acquisition Act, the proceedings of the Collector are void and there can be no valid reference to

Land Acquisition Act—(Contd.)

the Civil Court. **Gajendra Sahu v. The Secretary of State for India in Council** .. 39

Landlord and tenant—Alternative defence by tenant, See Possession, suit for ... 557

— and tenure-holder—Contract in contravention of section 41 of Cess Act, *See Bengal Cess Act, Sec. 41* ... 525

Landlord's recognition, nature of—Transfer of non-transferable occupancy holding, See Occupancy holding, non-transferable bequest of ... 261

Land Registration Act, sections 3 (10), 78—Revenue-free property—Resumption under Regulation XXXVII of 1793.

The mere fact that the area of the land is over 100 bighas and that it was capable of being resumed by Government under Regulation XXXVII of 1793 is not sufficient to make it revenue-free property within the meaning of section 78 of the Land Registration Act. **Ratanmanji Devi v. Dina** .

Nath Chatterjee .. 523

—, *Secs. 42, 48, 52, 55—Registration of name, Collector's power to order—Conflicting claims—Reference to Civil Court what to state—Possession—Widow in possession in lieu of dower—Reference, irregular and contrary to Law—High Court's power of revision—Civil Procedure Code (XIV of 1882), Sec. 622—Other remedy open to aggrieved party.*

Before a Collector can order the name of an applicant to be registered under the Land Registration Act as proprietor of an estate or of any interest therein, he must satisfy himself that the possession exists or that the alleged succession or transfer has taken place and that the applicant has acquired possession in accordance with such succession or transfer but not otherwise. The determination of the question of possession alone is sufficient when the applicant claims to have assumed charge as joint proprietor on behalf of his co-sharers or as manager. When the applicant claims to be proprietor by succession or transfer, the Collector has to satisfy himself that the succession or transfer has taken place and that the applicant is in possession accordingly. In this latter case, the applicant cannot succeed unless both the elements are established.

If there is a dispute as to the possession, succession or acquisition by transfer, by the applicant, of the extent of interest in respect of which he has applied to be registered, the Collector should, in the first instance, try to satisfy himself, whether any person is in possession of the interest in dispute. If it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute, the Collector may adopt one of two courses. He may either himself determine summarily the right to possession, deliver possession accordingly, and make the necessary entry in the Register or he may make a reference to the Civil Court which may determine summarily the right to possession and deliver possession accordingly.

It is not enough for the Collector to repeat the language of section 55 of the Land Registration Act and to say that in his opinion the dispute ought to be properly determined by a Civil Court. He must state that it is not proved to his satisfaction that any person is in possession of the interest in dispute.

• When a person has proprietary interest in land and as such is entitled to receive rent, he is in possession of his interest if he is in receipt of rent, while his tenant who is in actual occupation has possession which, in a sense, is the possession of the landlord or superior proprietor.

Land Registration Act—(Contd.)

Where the order of reference by the Collector to the Civil Court shows on the face of it that he did not direct his attention to the question whether any person was in possession of the interest in dispute.

Held—That the reference was irregular and in contravention of the provisions of section 55 of the Land Registration Act.

When a Civil Court finds upon the facts that a Mahomedan widow is in possession of the disputed property, as proprietor, by receipt of rent, that she is entitled to a large sum of money from the estate of her husband on account of her dower and that she peaceably entered into possession upon the death of her husband and claimed to hold possession not as a wrong-doer but upon an assertion of title which is *prima facie* well founded in law, it exercises jurisdiction illegally and with material irregularity when it makes an order the effect of which is to determine the question of title and to oust her from possession.

Though the Civil Court acquires jurisdiction by virtue of the reference made by the Revenue Court, yet once it has got seisin of the case, it exercises its power as a Civil Court, and its decision is a decision of an ordinary Civil Court. Hence, the High Court has jurisdiction to interfere either under section 622, Civil Procedure Code, or under section 15 of the Charter Act

The High Court can interfere under section 622, Civil Procedure Code, even though the aggrieved party has other remedy available. **Omatul**

Medhi v Kulsum ...

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—, Sec. 78—Registration during pendency of suit.

If the name of a proprietor is registered under the Land Registration Act, during the pendency of a suit for rent by him, and the registration decree is produced in the course of the trial, it must be held that there is sufficient compliance with the requirements of the Act. **Rabia Khatun v.**

Rani Bilashmani Debi ...

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—, Sec 78—Malikana, not rent, *See* Malikana, claim for 300

Land revenue, realisation of—Indian Contract Act (IX of 1872), sections 59 and 60.

Sections 59 and 60 of the Indian Contract Act apply to transactions in relation to realisation of land revenue. **Jotindra Mohan Sen v. Uma**

Nath Guha ...

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Law, question of—Considerations of law in the process of reasoning—

Question whether jhum lands lay within or without the limits of the settled estate, *See* Regulation III of 1891 ...

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Legatee, consent of—Creation of mortgage after date fixed for payment of legacy—Continued possession of executor—Presumption, *See* Mortgage

by executor and residuary legatee ...

345

Legal necessity—Facts, *See* Reversioners ...

458

Limitation Act, Sec. 22—*proforma* defendant joined as plaintiff, *See* Plaintiff, added ...

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—, Sch. II, Art. 14, applicability of, *See* Limitation Act,

Sch. II, Arts. 14, 121 ...

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—, *See* II, Arts. 14, 121—Possession, suit for—Noabad taluk—Sale for arrears of revenue, purchaser at—Re-settlement with defaulting proprietors.

Article 14 of Schedule II of the Limitation Act refers to orders and proceedings of a functionary to which by law is given a particular effect in favour of one person or

Limitation Act—(Contd.)

against another, subject, in the regular course, to a further judicial proceeding having for its object to quash them or set them aside.

The article has no application where an order is null and void and does not affect the plaintiff's interest, so that there is no occasion to set it aside.

Where subsequent to the purchase of an entire Noabad mehal at a sale for arrears of revenue by the plaintiff, the term of the taluk expired and Government resettled the taluk in favour of the defaulting proprietors and the plaintiff instituted a suit for recovery of possession of a parcel of land included in the taluk purchased.

Held,—That the rule of limitation applicable was that embodied in Article 121 and not in Article 14 of Schedule II to the Limitation Act.

Maqbul Ahmad v. Hara Gobinda Kalal ... 470

—, Sch. II Art. 109—Period when begins to run—Illegal Putni Sale, setting aside of—"When the profits are received," and "where the plaintiff has been dispossessed by a decree afterwards set aside," meaning of, *See* *Mesne profits*, suit for ... 181

—, Sch. II, Art. 109, Third column, meaning of, *See* *Mesne profits*, suit for ... 181

Limitation—Tenant in possession of other land of landlord for more than 12 years, if adverse, *See* *Possession*, suit for ... 557

Lis pendens—*Transfer of Property Act (IV of 1882), Sec. 52—Mortgage suit—Interest in immovable property—Contentious suit.*

A suit on a mortgage is a suit with respect to an interest in immovable property, and a suit for sale on a mortgage praying relief against the mortgagors and others is from the beginning a contentious suit within the meaning of section 52 of the *Transfer of Property Act*. **Durga Prasad v. Madho Prasad** ... 153

Lunacy, when inheritance falls in—Not congenital, *See* *Hindu law—Shebaitship* ... 369

Maintenance, amount of, if can be limited by will—Hindu widow—*Dayabhaga School*, *See* *Will* ... 489

—, amount of, if can be excluded by implication—Hindu widow—*Dayabhaga school*, *See* *Will* ... 489

Major charge, sanction not given—*Minor charge*, trial on, validity of

It is not desirable that a case should be proceeded with against a person, piecemeal. Where therefore a person could not be tried on a major charge without the sanction of the Civil Court.

Held, he ought not to be tried for minor offences. **Giridhari Marwari v. Emperor** ... 73

Malice, during enquiry, *See* *Malicious prosecution* ... 337

Malicious Prosecution, suit for, damages for—*Principles applicable to the case—Prosecutor—Malice, the foundation of the action—When may malice be shown—Knowledge of the defendant as to the falsity of the charge—Liability in such a case.*

In an action for damages for malicious prosecution, the person who can be made liable is the prosecutor.

Melicious Prosecution—(Contd.)

The determination of the question as to who the real prosecutor is, depends upon all the circumstances of the case. The mere setting of the law in motion, is not the criterion, nor is it enough to say that the prosecution was instituted and conducted by the police; the conduct of the complainant, before and after making the charge, his means of information and motives, must also be taken into consideration.

The foundation of the action is malice, and malice may be shown at any time in the course of the enquiry; a prosecution commenced *bona fide*, may become malicious in any of the stages through which it has to pass.

Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh... 337

Malik, meaning of—Absolute ownership, *See* Hindu Law, will ... 20

—, *in will, construction.*

Where the term 'Malik' is used in a will, its precise meaning is to be determined by the context and with reference to the other clauses of the document. **Purna Chandra Bysack v. Gopal Lal Sett** ... 369

Malikana, claim for—*The Land Registration Act (VII of 1876 B. C.), Sec. 78—Malikana, not rent.*

Section 78 of the Land Registration Act is no bar to a claim for *Malikana*, which is not a claim for rent. **Syed Shah Najamuddin**

Hyder v. Syed Zahid Hossein ... 300

—, not rent, *See* *Malikana*, claim for ... 300

Managing member of joint Hindu family, right of, to withdraw rent deposited in Court—Suit for rent by managing member for self and his next friend of minor brother—Managing member, rights of—Mitakshara School—Civil Procedure Code, (Act XIV of 1882), Sec. 461, object of—Joint brothers—Surety.

A managing member of a joint family, governed by the Mitakshara system of Hindu Law, who was appointed guardian *ad litem* of his minor brother for the purpose of a rent suit in which both the brothers obtained a decree for arrears of rent against their tenant, can withdraw the money deposited in Court by the tenant to the credit of himself and the minor, without obtaining leave of the Court under section 461 of the Code of the Civil Procedure

Per Mitra J.—A managing member is the accredited agent of the family and can do all acts, beneficial to and necessary for the family. The introduction of the infant member of the family under the representation of the managing member as a next friend was merely formal, a matter of procedure, and was not necessary so far as the substantive rights were concerned.

Section 461 of the Code of Civil Procedure does not contemplate an execution of a bond for an indefinite amount or for the benefit of a co-parcener.

Per Casperz, J.—The object of section 461 of the Code of Civil Procedure is to protect property received by guardians *ad litem* on behalf of the minors they represent. There is nothing in the words of the section from which any exception may be deduced.

The managing member of a Mitakshara family cannot sue without joining the other members as parties to the suit. There may be cases in which a manager alone can sue to recover rent: for example, if he has given a lease in his own name, and the suit for rent due in terms of the lease.

Joint brothers cannot be sureties, one of another, in a Mitakshara family. Hence the adult plaintiff cannot be called upon to furnish security.

Managing member—(Contd.)

in respect of money to be received by him on behalf of his minor brother who was made a co-plaintiff in order to obtain a joint decree for rent.

• • • Harihar Pershad Singh v. Mathura Lal ...	256
rights of—Mitakshara School, See Managing member	
of joint Hindu family ...	256

Matter—Subject matter need not be same—Rent suit—*Ex parte* decree, See Civil Procedure Code, Sec. 13 Expl. II ... 82

Meane profits, suit for—*Limitation Act, Schedule II Arts. 109, 120, applicability of*—"When the profits are received" in Art. 109, meaning of.

Where the defendants wrongfully received profits which were actually receivable by the plaintiff but for an illegal *putni* sale which was afterwards set aside, the period of limitation is three years from the time when the profits were received.

By the clause "where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession" in the third column of article 109, the Legislature limits the conditions under which the ordinary rule of three years may be extended.

The clause "when the profits are received" in the third column of article 109 means "when the profits are actually received." **Pearry Mohun**

Roy v. Khelaram Sarkar ...	181
—, suit for—Rent, suit for— <i>Res judicata</i> , See Civil Procedure Code, Secs. 12 and 13 ...	303

Mohunth—*Transfer, power of—Succession—Nomination—Custom—Mutt, superior and subordinate, relation between—Conditional decree giving possession till a Mohunth is duly installed, if to be passed.*

A Mohunth of a Mutt cannot transfer the right of management vested in him, though coupled with the obligation to manage in conformity with the trust annexed thereto.

Where one Mutt is subordinate to another in the sense that the latter has the right of nomination of the Mohunth of the former, the Mohunth of the former *myt* cannot by a deed of transfer alienate his right in favour of the Mohunth of his superior mutt.

There is no fixed rule which regulates the relation between a superior and a subordinate mutt; even if a mutt is subordinate to another, it must be governed by its own rules of management.

In the case of mutts the custom governing the particular establishment has to be proved.

In the case of mutts there is no uniform custom applicable to all mutts so far as the question of succession to the office of Mohunth is concerned.

In cases in which a Mohunth is allowed by custom to nominate his successor by word of mouth or by a will, such nomination is subject to the confirmation of the entire body of *Sanyasis* of different mutts, who are invited to be present at the ceremony of installation when the new Mohunth is invested with the *Chudder* or the robe of office.

When no custom is proved and no authority in the outgoing Mohunth to make a nomination is established, the Mohunth should be elected by all the *Sanyasis* of the institution.

Where the plaintiff has not asked for declaration of rights to nominate a Mohunth for another mutt, nor in the plaint stated precisely the nature of the relations between the two mutts but claimed title in himself

Mohunth—(Contd.)

On the basis of the *Supardanama* which created no valid title in him in the disputed properties, he cannot at the appellate stage of the case, be permitted to turn round and say that he is entitled to have a decree for administration, to recover possession of the disputed properties and to keep such possession till a *Mohunth* has been appointed. **Prayad Das v.**

Mohunth Kriparam	499
Hokarari lease , perpetual, construction of— <i>Bilmukhta</i> , See Bengal Cess Act, Sec. 41	525
Mortgage , amount, suit for realisation of—Mortgagee purchaser of a share of one of the mortgagors—Share of debt to be deducted, See Equity of redemption	92
— of holding—Landlord purchasing in execution of money decree, if can question transferability, See Occupancy holding	29
— Occupancy ryot dying without heirs—Lien, if subsists, See Bengal Tenancy Act, Sec. 22	324
— Party—Partition suit, See Decree	478
— by executor, and residuary legatee setting aside—Executor—Pecuniary legatee—Deeds, deposit of, with a mortgagee—Constructive notice—Legacy—Will.	
A mortgage by an executor, who is also residuary legatee, to secure his private debts, may be set aside even at the suit of a pecuniary legatee; the position of creditors is less favourable, as a mortgagee without notice may be safe as against them.	
Where deeds were deposited with a mortgagee, the contents of which, and, enquiry based thereon, would have led to the discovery of a charge on the mortgaged premises, the mortgagee must be taken to have had constructive notice of the charge.	
Where a legacy was payable within six years of the death of the testator and the executor created a mortgage eight years after the due date, the mortgagee was not entitled to assume the consent of the legatees in spite of the lapse of time, as two of the legatees were infants and the continued possession of the estate by the executor, was not inconsistent with the purposes of the will. Bank of Bombay v. Suleman Somji ..	
— decree—Execution—Objection as to property belonging to stranger, where triable, See Civil Procedure Code, Secs 244, 280	20
— property, purchase of, by prior and puisne mortgagees—Accounting—Tenants settled by prior mortgagee, right of, See Redemption, right of	173
— suit—Interest in immovable property—Contentious suit, See <i>Lispendens</i>	153
Mutation , made in substitution of heirs, meaning of, See Ejectment, suit for	518
— patta—Absence of words importing hereditary character, if destroys permanent tenancy, See Ejectment, suit for	513
— patta when confirmatory, See Ejectment, suit for	513
Mutt —Superior and subordinate, relation between—Nomination—Transfer, power to, See Mohunth	499
Mutwali , power to appoint.	

The power to appoint a *mutwalli* is a power in the nature of a trust. The power to appoint a new *mutwalli* stands on the same ground as the power to appoint new trustees in England.

Mutwali—(Contd.)

A person who is below the age of puberty cannot be appointed *mutwali*.

Satish Chandra Mullick v. Ashruffudin Ahmad ... 196

—, power to appoint, nature of—Power to appoint new *mutwali*,
nature of, *See Mutwali* ... 196

—, who can be appointed, *See Mutwali* ... 196

Negotiable Instruments Act, Secs. 30, 39, 86—Hundi payable at sight—Unconditional acceptance—Holder agreeing to arrangement for payment with acceptor—Notice of dishonour, omission to give—Drawer discharged.

The acceptor of a *hundi* payable at sight accepted the *hundi* unconditionally. The holder of the note agreed to receive the money in 3 days' time and did not give notice to the drawer of this arrangement. The acceptor failed to pay the amount within the promised time, the holder gave the drawer notice of dishonour, 10 days after that date :

Held—That the conduct of the holder discharged the drawer from his liability under the terms of sections 30, 39 and 86 of the Negotiable Instruments Act. **Askaran Baid v. Pir Bux** ... 163

Nij-jote land, suit for possession of—Tenant admitting plaintiff's title as landlords' makararidar—Occupancy right, *See Onus* ... 170

Noabad taluk—Re-settlement, meaning of.

A Noabad taluk is not necessarily temporarily settled ; it may be a permanently settled one. The re-settlement of a Noabad taluk does not necessarily mean a settlement with new talukdars, it may be an adjustment of the revenue and nothing more. **Maqbul Ahmad v. Hara Gobinda**

Kalal ... 470

—, Sale for arrears of revenue—Re-settlement with defaulting proprietor—Possession, suit for, *See Limitation Act, Sch II, Arts. 14, 121* ... 470

Non-occupancy raiyat—Accretion to holding—Bengal Alluvion and Diluvion Regulation (XI of 1825), Sec. 4 cl. (1).

A non-occupancy tenant can acquire a right to hold a newly-formed land as an accretion to his holding under cl. (1) of section 4 of Regulation XI. of 1825. **Amjad Ali v. Kaderjan Bibi** .. 537

Ahmed Bepari v. Toki Mahomed .. 538

Miajan v. Akram Ali Bhuiya ... 541

Notice, constructive—Charge—Deeds, deposit of, with mortgagee, *See*
• Mortgage by executor and residuary legatee .. 345

— of demand, contents of—Enhancement of rent—Talukdar, *See*
Regulation, Bengal Decennial Settlement, Sec. 51 ... 329

— of dishonour, omission to give—Drawer, liability of—Hundi payable
at sight—Unconditional acceptance—Holder arranging payment with
acceptor, *See Negotiable Instruments Act, Secs. 30, 39, 86* ... 163

—, service of, on the outer-door of the office, if proper—Person working
as an employee, *See Civil Procedure Code, Sec. 80* ... 294

— to accused person, if necessary—Transfer of case by District
Magistrate, *See Criminal Procedure Code, Sec. 528* ... 241

— to accused—Further enquiry, *See Criminal Procedure Code, Sec. 437* ... 73

Notice—(Contd.)

to quit, validity of—Monthly tenancy, <i>See</i> Transfer of Property Act, Sec. 106 ...	34
to quit, if necessary—Tenancy, determination of—Raiyat holding over—Trespasser, <i>See</i> Ejectment, suit for ...	533
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Occupancy, raiyat mortgaging the holding—Dying without heirs—Mortgage lien, if subsists, <i>See</i> Bengal Tenancy Act, Sec. 22 ...	324
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holding, non-transferable, mortgage of—Landlords, purchaser in execution of money-decree, if can question the transferability—Estoppel—Evidence Act (I of 1872), Sec. 115, if exhaustive—Transferability, question of	
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The landlords of a non-transferable occupancy holding, who purchased the holding at a sale held in execution of a money decree, can resist the claim of the mortgagee of the said holding on the ground of its non-transferability without their consent. The English law of mortgage is not applicable to such a case.

The law of estoppel in force in India is contained in section 115 of the Evidence Act.

The question of transferability properly arises in such a case

The dictum in the case approved. <i>Asmatunnessa Khatun Saheba v Harendra Lal Biswas</i> ...	29
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non-transferable, bequest of, if void or voidable—Void and voidable transaction, nature of—Recognition by landlord of transfer.	
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When a transfer of a non-transferable occupancy holding takes place, the transaction is in law voidable at the option of the landlord only. Hence the heir of an occupancy raiyat of such holding is bound by a bequest of the holding made by the latter in favour of a stranger.

If a transaction is void, no rights in favour of either party can grow under it, nor can it form the foundation of any estoppel. It is not necessary to have it set aside; its invalidity may be set up whenever it is sought to be enforced. It is incapable of being confirmed or ratified.

If a transaction is voidable, it is valid and binding upon the parties and persons deriving title through them, whether by descent, purchase or otherwise, until it is avoided.

The transfer of an occupancy holding which is not transferable by local custom, may be validated by the consent of the landlord.

When the landlord recognises the transfer as valid, he recognises the transfer of the existing occupancy right as a valid transaction. <i>Hari Das Bairazi v Uday Chandra Das</i> ...	261
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Officer, permanent—Engineer—Bengal Municipal Act, Sec. 83—Standard plan, <i>See</i> Bengal Municipal Act, Secs. 406, 406, 409 ...	507
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who should inspect bustee or submit report—Bengal Municipal Act, Sec. 83, <i>See</i> Bengal Municipal Act, Secs. 400, 406, 409 ...	507
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Of the rival wife—Dayabhaga, Verses 32 and 33—Interpolations, <i>See</i> Hindu Law—Shebaitship ...	369
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Onus—Ancestral lands—Suit by son against father, to set aside deed of sale of lands—Father reversionary heir—Evidence.

In a suit by the sons against their father, in a Hindu family, to set aside a sale of lands, on the ground that they were ancestral and inalienable, the onus is upon the plaintiffs to establish their case that the lands are ancestral and not self-acquired.

Where the title of the father was that of reversionary heir to the late admitted owner, A, to show that the lands are ancestral, it must be proved that they had come to A, by descent from a lineal male ancestor in the male line, through whom the plaintiffs also claim. **Atar Singh v. Thakar**

Singh ... 359

— of proof—Ejectment, suit for—*Nij-jote* land, suit for possession of—*Maharridar*—Occupancy raiyat, plea of.

In a suit for ejectment from *nij-jote* lands, where the defence set up a right of occupancy, when the plaintiff was admitted to be a *maharridar* of the landlord, it lies upon the defendants to make out that they are occupancy raiyats and are entitled to remain there. **Baraik Kamal Sahi v. Lilhu**

Christian ... 170

"Or otherwise," construction—Ejusdem generis, See Bengal Tenancy Act, Sec. 22

324

Partition Suit—Allotments—Drawing lots—Civil Procedure Code, Sec. 306.

Semle. A Judge, in making allotments in a partition suit, should not draw lots in the manner provided by section 72 of the Estates Partition Act (V of 1897), but should follow the procedure laid down in section 396 of the Civil Procedure Code and make the allotment of the shares after a full consideration of the rights and objections of different parties. **Narsingh**

Narain Singh v. Harkhu Singh ... 521

Party agreeing to be bound down—No evidence—Order without jurisdiction, See Criminal Procedure Code, Sec. 107

68

Pedigree of family records, admissibility of—Post litem motam—Declaration by a deceased member—Family reputation or tradition—Dispute at the time of drawing of pedigree—Adoption of pedigree by member of the family.

In support of a claim based on an alleged right of inheritance, three pedigrees were produced.

Held,—(1) that one of these pedigrees which had been drawn up *post litem motam*, was inadmissible in evidence; (2) that another pedigree was admissible as a declaration made by a deceased member of the family touching the family reputation or tradition on the subject of its descent; to make this pedigree inadmissible, it was not sufficient to show that when it was drawn up, there was some dispute between the parties; it was necessary to prove that the matter now in controversy, after the statement, was in controversy then, before the statement and (3) that the third pedigree was admissible, for though not proved by the maker, it had been adopted by a member of the family, and was not made *post litem motam*. **Kalka**

Parshad v. Mathura Parshad ... 447

Permanent Settlement. tenure from—Evidence, nature of—Long possession, See Right to sue

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Person whose property has been sold—Beneficial owner, See Civil Procedure Code, Sec. 310A

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Plaint —Amendment and restoration to original form—Second appeal, <i>See</i>	
Court-fee	485
—, signature and verification—Government pleader, <i>See</i> Civil	
Procedure Code, Sec. 51	34
Plaintiff added — <i>Proforma</i> defendant joined as plaintiff— <i>Limitation Act</i>	
(<i>XV of 1877</i>), Sec. 22.	
Where a person, who was at the institution of a suit made a <i>proforma</i>	
defendant, subsequently is joined as a plaintiff, Sec. 22 of the <i>Limitation</i>	
Act does not apply. In such a case the added plaintiff is not a 'new	
plaintiff.' Nogendrabala Debya v. Tarapada Acharjee and others ...	286
Pleadings —Avoiding a contract, <i>See</i> Fraud	135
—, joinder of new, in appeal—Plaintiff's application to alter the	
judgment so as to defeat his own action, <i>See</i> Trustee, suit by ...	230
Point , abandonment of, in lower Court, consideration by <i>Judicial Committee</i>	
Where the judgment of the appellate Court contained a statement that	
a particular point had been abandoned, which statement was challenged,	
the judicial committee considered the surrounding circumstances and held	
that the point had not been abandoned. Kalka Parshad v. Mathura	
Parshad	447
Police Act , sections 17, 19— <i>Special constable</i> , appointment as— <i>Refusal to serve</i> — <i>Pro-</i>	
<i>secution</i> — <i>Riot or disturbance of the public peace</i> — <i>Ordinary police force</i> insufficient.	
It is only when there is a danger of riot or other disturbance of the public	
peace and the police force available is insufficient to preserve the peace and protect	
the inhabitants of the village where disturbances are apprehended that a person may	
be appointed a special constable under section 17 of the Police Act.	
If the Magistrate apprehends that a certain individual is about to	
commit a breach of the peace he may be proceeded against under section 107,	
Criminal Procedure Code, but he cannot be made a special constable under	
section 17, nor does he, on his refusal to act, render himself liable to	
prosecution under section 19 of the Police Act. Radha Kanta Lall v.	
King Emperor	66
Possession by Mahomedan widow in lieu of dower—Order of Civil Court	
determining title and ousting from possession—Exercising jurisdiction	
illegally and with material illegality, <i>See</i> Land Registration Act, Secs. 42	
48, 52, 55	215
—, long, in assertion of title—Title, proof of, <i>See</i> Regulation III	
of 1891	436
—, Person in receipt of rent—Tenants' possession, nature of, <i>See</i>	
Land Registration Act, Secs. 42, 48, 52, 55	245
—, suit for, by some of the reversioners for their shares, maintain-	
ability, <i>See</i> Reversioners	458
—, suit for—Noabad taluk—Sale for arrears of revenue—Re-settle-	
ment, with defaulting proprietor, <i>See</i> Limitation Act, Sch. II, Arts.	
14, 121	470
—, suit for— <i>Defence</i> , alternative— <i>Possession</i> either as a tenant or for	
more than 12 years— <i>Adverse possession</i> .	
It is open to the defendants, in the first place, to plead, that the lands were	
comprised in their tenancy and that consequently the plaintiffs were not entitled	

Possession—(Contd.)

to recover possession, and in the second place, to assert that if the tenancy was not established, as they had held possession for more than 12 years, the right of the plaintiffs to recover possession was extinguished by the law of limitation.

When the case of the plaintiffs was that the defendants were tenants in respect of other lands not in dispute and that by act of trespass they came to occupy the disputed land within 12 years before suit, but it was proved that the defendants had been in occupation for more than twelve years, the title of the plaintiffs to recover possession by ejectment of the defendants was barred by limitation. The question is not one of adverse possession but of limitation. **Raktoo Singh v Sudhram Ahir** 557

Presumption—Alienation without legal necessity—Consent of next reversioners, having limited interest, See Hindu Law—Widow 120

—————, *See* Entry 116

—————, *Legatee, consent of—Creation of mortgage by executor after date fixed for payment of legacy—Executor, continued possession, See Mortgage by executor and residuary legatee* 315

—————, *Monthly tenancy—Evidence as to commencement or character wanting, See Transfer of Property Act, Sec. 106* 31

—————, *Permanency of holding—Hereditary character, absence of words importing, See Ejectment, suit for* 513

—————, *rebuttable—Area exceeding 100 bighas—Bengal Tenancy Act, Sec. 5 (5), See Ejectment, suit for* 533

Primogeniture—Restriction on alienation.

Where there is a custom of primogeniture, there is no restriction on alienation by the incumbent for the time being, unless a special custom is proved to the contrary. **Krishna Pershad Roy v. Romes Chunder Mandal** 274

Prior mortgage not in existence—Purchaser in execution of prior mortgagee's decree in possession—Puisne mortgagee not made a party, position of—Transfer of Property Act, Sec. 93. *See* Redemption and sale, suit for 547

Private defence—Sudden fight—Murder—Taking refuge in offenders' land, See Indian Penal Code, Secs. 149, 301, exception 4 561

Procedure—Appeal by plaintiff and defendant—Ejectment, suit for, non-maintainability—Nature of tenancy, See Suit 552

Property, affecting rights to, statute—Construction, See Regulation III of 1891 436

Proprietor's private land—Factory Zerai—Absence of evidence of khas possession, See Ejectment, suit for 533

Prosecution, piecemeal, See Major charge 73

Prosecutor, real ascertainment, See Malicious prosecution 337

Purchaser, in execution of prior mortgagee's decree, position, of—Puisne mortgagee not made a party in prior mortgagee's suit, See Redemption and sale, suit for 547

—————, *Status of—Reversioner, remedy of—Remarriage, See Hindu widow* 542

Putni, purchase of, share of, without the consent of zemindar, effect of—Putni Regulation (VIII of 1819), section 8—Co-sharer landlords collecting share of rent separately, if constitutes separate tenancy—Sale in execution of decree for share of rent, effect of.

A purchaser of a share of a *putni* acquires a valid title in the property, although his purchase was not recognised by the zemindar. He is not exempted from liability for rent jointly with the transferor if the landlord chooses to recognise him as one of the joint-holders of the *putni*. Section 8 of the Putni Regulation only prevents any splitting of the tenure and apportionment of the rent without the sanction of the landlord.

One of the co-sharers in the zemindari who had a 5 annas interest brought a suit for his share of the rent against the registered putnidar and obtained a decree, in execution of which, he sold a 5 annas interest in the *putni* :

Held—That the effect of the sale was precisely the same as that of a sale under a money-decree ; that is, the right, title and interest of the judgment-debtor at the time of attachment passed.

No separate tenancy is constituted under a co-sharer landlord merely by his collecting his share of the rent separately from the tenant. **Aosib Ali**

Pramanik v Bisseeshuri, alias Harani Dasaya Chowdhurani 554

— **Regulation. Sec. 6, construction of—Splitting up tenure, See**
Putnee, purchase of share of 554

Raiyat, holding over—Trespasser—Notice to quit, if necessary—Tenancy, determination of, See Ejectment, suit for 533

Ratification—Contract Act, Secs. 196, 199—Hindu widow—Reversioners—Agency.

Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. A woman with a limited interest could not by acts *ex-post facto* charge upon the estate which she represents, obligations not originally binding upon it. A Hindu widow cannot be said to give a lease on behalf of the reversioners. The acts performed by the reversioners after the death of the widow cannot amount to a ratification of the lease, as the widow is not the agent of the reversioners. **Bejoy Gopal Mukerji v Girindra Nath Mukerji** ... 458

Receiver appointing tehsildar—Agent and sub agent—Indian Contract Act, Secs. 191, 192, See Accounts, suit for 116

Record of rights—Alteration and correction, suit for—Maintainability, See Bengal Tenancy Act, Chap. X 322

Redemptio n. right of—Mortgage—Purchases by prior and puisne mortgagees—Accounting—Tenants settled on the land by prior mortgagee, right of.

Where the prior mortgagee purchased the property mortgaged to him in a suit in which the puisne mortgagee was not made a party and the latter also purchased the same property subsequently in a suit in which the prior mortgagee was not made a party :

Held, that each party would be entitled to redeem the other ; but the preferable right to redeem was with the puisne mortgagee.

The puisne mortgagee is bound to pay the mortgage money with interest at the rate specified in the mortgage to the prior mortgagee and any amount paid by the prior mortgagee in possession for the protection of the property or for redeeming any prior mortgage with interest as also the costs of the suit and appeal as in an ordinary redemption suit. An account was to be taken of the amounts realised from the

Redemption—(Contd.)

property by the prior mortgagee as mortgagee in possession from the date of the possession taken by him (prior mortgagee). If on taking accounts any balance be found in favour of the puisne mortgagee, the prior mortgagee will be bound to pay the said amount to him; but if otherwise, then the usual decree in redemption suit will be passed.

The tenants settled by the prior mortgagee on the land are entitled to remain on the land until it be found in any subsequent suit or suits that they are liable to ejectment under the Bengal Tenancy Act or any other Act that may be in force. **Kedar Prosanna Lahiri v. Girindra Prosad**

Sukul ... 173

— and sale, suit for, by subsequent mortgagee—Purchaser in execution of prior mortgage decree in possession, position of—Redemption money, deposit of, after date fixed but before order absolute—Deposit accepted by Court—No formal order extending time—Transfer of Property Act (IV of 1882, section 93.

Defendant purchased a certain property in execution of decree on a suit by a first mortgagee in which the plaintiff, a third mortgagee was no party. He (the defendant) redeemed the second mortgage and was in possession of the property. The plaintiff sued to enforce his mortgage as also to redeem prior incumbrances :

Held, that section 93 of the Transfer of Property Act did not, in its literal terms, apply to a case where there was no prior mortgage still in existence, but the principles there laid down ought to be followed in dealing with such a case.

The plaintiff who did not deposit the redemption money within the time allowed by Court can redeem afterwards, before a final order is made under clause 2 of section 93 of the Transfer of Property Act, that is before the decree is made absolute.

The position of the defendant, who is in possession of the property under an obligation to re-transfer it, if the redemption money is paid on a fixed date, is analogous to that of a mortgagee by conditional sale.

If a deposit of the redemption money is accepted by the Court before the final order under clause 2 of section 93 of the Transfer of Property Act, but after the date fixed for payment, it becomes an effectual deposit, although no formal order extending the time was passed. **Bepin Behary**

Saha v. Mukunda Lal Ghosh ... 547

— **Money**—No deposit within the time fixed by Court—Deposit before decree made absolute, if effectual—No formal order extending time, *See* Redemption and sale, suit for ... 547

Re-entry, right of—Forfeiture—Voluntary alienation, *See* Grant, construction of ... 188

Reference by Collector to Civil Court irregular—Person in possession of interest in dispute, *See* Land Registration Act, *See* 42, 43, 52, 55 ... 245

Registration Act, Sec 17 (d)—Dastak giving possession and right to cultivate, *See* Admissibility ... 538

— **Sec 17 Cl. (i)**—Compromise petition of—Criminal Proceeding, withdrawal of—Order not incorporating terms of petition, *See* Evidence Act, admissibility of ... 90

Registration of name when can be ordered by Collector—Possession—Succession of acquisition by transfer, *See* Land Registration Act, Secs.

42, 48, 52, 55 245

— of name—Suit pending—Sufficient compliance, *See* Land
Registration Act, Sec. 78 299

Regulation. Bengal Decennial Settlement (VIII of 1793), Sec 51—Valid notice, contents of—Undivided taluk—Joint settlement—Separate collection—Assessment—Measurement—Separate tenancy—Declaratory decree—Liability of taluk to enhancement, not in issue.

A talukdar is entitled to a notice of demand for enhancement of rent under section 51 of the Bengal Decennial Settlement Regulation (VIII of 1793). The notice should contain one of the grounds mentioned in the said section ; a notice not containing any such ground is bad in law.

A declaratory decree declaring a talukdar's tenure liable to enhancement should not be passed, where the question of the liability to enhancement of the taluk as a dependent taluk under the provisions of section 51 of the Bengal Decennial Settlement Regulation was not put in issue.

A taluk was situated within three zemindaries. The settlement of it was a joint one, but the collection was separate. The proprietor of two of the zemindaries caused the entire taluk to be measured, assessed with rent upon the area found therein and granted a *dowl* to the holders of the taluk, who agreed to pay their share of rent thus assessed :

Held (per Mitter J.)—That the effect of the *dowl* was to constitute the fractional share of the undivided taluk a separate and distinct tenure with which the proprietor of the remaining zemindary had no concern. Hence in a suit for enhancement of rent of a taluk by the zemindar, the proprietor of the remaining zemindary was not a necessary party. **The Bank of Hindustan, China and Japan Ltd v. Babu Shib Doyal Tewary ... 329**

— *III of 1891 (the Sylhet Jhum Regulation)—Considerations of law involved in the process of reasoning—Jhum cultivation, nature of—Government's claim to confiscate proprietary rights—Burden of proof—Proprietary title—Long possession and enjoyment.*

When lands have long been in the enjoyment of the zemindar and it is asserted by Government that they are entitled to confiscate the proprietary rights upon payment of compensation under Reg. III of 1891, the *onus* is upon the Government to show that the facts of the case are such as to bring it within the operation of the Regulation.

To bring a case within the Regulation it is not sufficient to show that at the time of Permanent Settlement, the income from *Jhum* cultivation was taken into account as asset for purposes of assessment ; it must also be shown that the income taken into account was derived from *Jhum* cultivation carried on beyond the limits of the settled estate.

The question whether *Jhum* lands lay within or without the limits of the settled estate is not necessarily a question of fact, specially if at every point in the process of the reasoning considerations of law have to be regarded.

Long possession of land in assertion of a particular title may be relied upon as proof of that title. **Mahomed Ali Haidar Khan v. The Secretary of State for India in Council ... 436**

Regulation VIII of 1793, Sec. 51, See Regulation, Bengal Decennial Settlement	329
— VIII of 1819, Sec. 6, See Putni, purchaser of share of	554
— XI of 1825, Sec. 4 (1), See Non-occupancy raiyat	537, 538, 541
Remand order —Decision of issue governing case—Final decree—Leave to appeal to Privy Council, See Civil Procedure Code, Sec. 595	168
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Retrial — <i>Real question not truthfully tried</i> — <i>Disagreement between Judge and assessors</i> . <i>Per Maclean, C. J. and Geidt J.</i> —Where a trial has been invalidated on legal grounds and the real question in the case has not been legally tried, a retrial ought to be held, unless it appears from the record that there is no evidence against the prisoner or that there is very little chance of a conviction. Mere disagreement between judge and assessors is no sufficient reason for refusing a retrial. <i>Per Woodroffe J. (Contra)</i> —The fact that the law gives operation to the finding of the judge and not to that of the assessors does not detract from the value of the opinion expressed by them. Where, therefore, the Judge and assessors have disagreed as to the facts, which were peculiar and as to which different conclusions have been arrived at by different minds, there ought to be no retrial ordered. Durga Charan Sanyal v. The Emperor	59
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Reversioners — <i>Suit by some for possession, maintainability</i> — <i>Hindu widow, traverse by</i> — <i>Legal necessity</i> — <i>Beneficial arrangement</i> — <i>Consideration</i> — <i>Avoiding legal proceedings</i> — <i>Family settlement, principle of, applicable to arrangement between parties interested in the property</i> . A suit by some of the reversioners to recover possession of their shares from the lessee of a Hindu widow after her death is maintainable. Each case of legal necessity must be judged upon its own facts. The reversioners must establish a very strong case to induce a Court of justice, equity and good conscience to set aside a beneficial arrangement by a Hindu widow which induced a sense of peace and security and one that has had a far-reaching consequence.	

Reversioners—(Contd.)

If a Hindu widow made a good bargain for herself, and if that bargain did not prejudice the position of the then reversioners, it should be given effect to.

If parties arrange to avoid the necessity for legal proceedings their arrangement is supported by sufficient consideration.

Apart from legal necessity a widow can validly alienate property that has devolved on her from her husband with the consent of the reversioners. The widow can make such an alienation by the entire surrender of her own interest and thereby accelerate the interest of the reversioners or she can part with her direct interest in the estate and convert it into an annuity. Subject to the payment of the annuity, the transferee will acquire an absolute interest.

The principle of family settlements is applicable to an arrangement by which the persons interested in the property mutually consent that the property shall be managed in a particular and a convenient manner and if the arrangement does not seriously prejudice the parties to it or those who e after them, a Court of equity will be slow to set it aside. **Bejoy Gopal**

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Right, adjudication of—Plaint, filing of, *See* Court ... 116

— to sue—Incumbrances, suit to avoid—Purchaser from a purchaser at a revenue sale—*Putnidar*—Permanent Settlement, tenure from before—Long possession—Presumption—Direct evidence.

A purchaser from a purchaser at a sale for arrears of Government revenue as well as a *putnidar* are persons who can sue to avoid encumbrances or under-tenures created since the permanent settlement.

It is not necessary that direct evidence should be given to prove the existence of a tenure from before the permanent settlement in order that it might be protected from avoidance on account of sale for arrears of Government revenue. A presumption in favour of its existence arises from the proof of the existence of a tenure for a very long time, say from 1824.

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Separate tenancy—Co-sharer collecting his share of rent separately, *See* Putni, purchaser of share of 554

Sessions Judge—Evidence recorded by one judge and orders passed by another—Sessions Trial—Change of Judge—Validity.

Per curiam A Sessions Judge cannot act on evidence recorded by his predecessor in office. On a change of the Judge, a sessions trial must commence *de novo*.

The judgment passed by a Sessions Judge on evidence partly recorded by his predecessor in office is illegal and must be set aside. **Durga Charan Sanyal v. The Emperor** ... 59

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Steamship Company—Notice of suit when to be given—Common Carriers Act (III of 1865) as amended by Act X of 1899, Sec. 10.

Section 10 of the Common Carriers Act as amended by Act X of 1899 placed a Steamship Company in the same position as a railway, and make it obligatory upon a person wanting to sue a Steamer Company to give notice of such suit within the time mentioned in the section. **Rivers Steam Navigation Co. Ltd. v. Kashi Prasad** ... 192

Step in aid of execution—Application for time.

An application for time is not a step in aid of execution and does not prevent subsequent applications from being barred. **Umed Ali v. Abdul**

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Stridhan, Pitridatta *ayautuka*, succession to—*Ayautuka stridhan*—*Dayabhaga*, Chap. IV, Sec. II, para 16—'Kanya,' meaning of—Sons or married daughters, preferable heirs.

Per Brett and Mitra JJ. (Coze J. dissentiente)—The son succeed in preference to married daughters to *ayautuka stridhan* property received by a woman from her father after marriage.

Stridhan—(Contd.)

• The word '*Kanya*' in Dayabhaga Chapter IV, section II paragraph 16 is confined to unmarried daughters alone.

The Dayabhaga of Jimuta Vahana is a paramount authority in the Bengal School. Other authorities may be followed; if there be any ambiguity in Jimuta Vahana's text; Srikrishna and Raghu Nandana deserve the greatest respect, but their opinions must yield to the authority of Jimuta Vahana.

• *Per Brett J. (Coxe J. dissentiente)*—The Dayabhaga lays down a general law of succession to *Ayautuka stridhan* and makes an exception in the case of such property received from a father, only to the extent that in the first instance unmarried daughter is preferred to the son.

Per Mitra J.—The later opinions of Srikrishna and Raghu Nandana which are not based on the text of the Dayabhaga ought not to be followed by the Court of Bengal. **Prosunna Kumar Bose v. Sarat Sashi Ghose** ... 200

Sub-committee—Power to sanction amendment of original plan—Avoiding expenses, *See* Bengal Municipal Act, Secs. 400, 406, 409 ... 507

Subject matter need not be same—Rent suit—*Ex parte* decree, *See* Civil Procedure Code, Sec. 13, Expl. II ... 82

Sub-lease by a non-occupancy raiyat—Central Provinces Tenancy Act, Sec. 46, Sub-Sec. 3, *See* Ejectment ... 156

Succession to property of Hill Tipperah Raj lying within British territory, *See* Jurisdiction of Civil Court ... 1

Suit—Dismissal—Appeal by plaintiff and defendant—Procedure.

Plaintiff brought an action for ejectment which was dismissed on the ground that it had been brought for a part of the tenancy, and therefore, not maintainable. The plaintiff appealed and the defendant also filed an appeal against a finding in the judgment as to the nature of the tenancy. The Judge decreed the defendant's appeal and affirmed the order of dismissal:

Held, that the procedure was erroneous. As the suit had been dismissed, the defendant could not appeal. The plaintiff's appeal should have been heard first, and if his grounds proved to have been well-founded, the defendant's objections should then have been considered. **Aga Mohammad Medhi Tenkhalgi v. Umesh Chandra Chatterji** ... 552

Surety to administration bond, liability of—Revocation of letters of administration for fraud, *See* Administration ... 94
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—, separate—Joint settlement—Separate collection—Undivided taluk—Measurement—Assessment, *See* Regulation, Bengal Decennial settlement, Sec. 61 ... 329

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— Trial with aid of assessors and trial by jury—Balance of convenience	

Per Woodroffe and Cox, JJ.—In transferring a case, no consideration should be had to the fact that by a transfer to a particular district, the accused will have the benefit of a trial by jury, where previously he had none. The real question is that of convenience of parties. **Durga**

Charan Sanyal v. The Emperor ... 59

Transfer of Property Act, Sec. 52—Mortgage suit—Interest in immovable property, *See* Lis pendens ... 153

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—, Sec. 93—Prior mortgage not in existence—Purchaser in execution of prior mortgagee's decree in possession—Puisne mortgagee not made a party, position of, *See* Redemption and sale, suit for ... 547

—, Sec. 106—Notice to quit—Validity—Tenancy at will or from month to month

Per Rampini J.—In the absence of any evidence as to the commencement of a tenancy or its character, it is to be presumed that the tenancy was a monthly tenancy expiring with the last day of the Bengali month of each year. A notice to quit, therefore, served on the 8th August 1899 requiring the tenant to quit on the last day of Chaitra 1306 (12th April 1900) was quite valid. **Pandit Rakhal Chandra Tewari v. The Secretary of**

State for India in Council ... 34

Trust, breach of—Trustee giving up rights under decree, *See* Trustee, suit by ... 230

Trustee, suit by—Decree in plaintiff's favour—Appeal by defendants—Plaintiff's application to alter the judgment so as to defeat his own action—New plaintiffs, joining of—Surrender of a decree in his favour by a trustee—Betrayal of trust—Refusal of the Court to alter the decree.

The plaintiff, the hereditary trustee of a temple dedicated to the worship of Shiva and where the customary ceremonies of Hindu worship were carried on sued the defendants, who represented a caste called the Nadar or Shanar caste. The question between the parties was whether the defendants and the caste to which they belonged had legal right to enter and worship in the temple. The first Court decided against the defendants, who thereupon appealed to the High Court. The plaintiff thought not to protest that he then saw that he and the Judge of the lower Court were wrong and asked the High Court that the judgment of the lower Court should be altered so as to defeat his own action. The High Court, on being applied to, as their

Trustee—(Contd.)

Lordships held very properly, reinforced the cause of the worshippers of the temple by joining certain new plaintiffs to the original plaintiff (whose confidence in the justice of his suit had by that time convalesced). The High Court refused to alter the decree and their Lordships held, correctly.

The compromise by the trustee was not *bonafide* and not lawful within the meaning of section 375 of the Civil Procedure Code. The decree of the first Court did not cease to be binding upon the parties by the mere fact of appeal though the pendency of the appeal opened the whole question for the appellate Court. A trustee who gives up the right under the decree under appeal is guilty of breach of trust **Sankaralinga Nadan v. Raja**

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Undue influence—*The Indian Contract Act, Amendment Act (VI of 1899), Sec. 2—Presumption—Landlord and tenant—Dominating the will—Kabuliyat unfairly obtained, onus—Executants—Suit to set aside by one of the executants.*

There is no broad or general presumption that a landlord, even an influential one, can so dominate the will of his tenants as to induce them to make unconscionable bargain in his favour.

The onus of proving that a *kabuliyat* was unfairly obtained lies on the person who alleges it.

Where a *kabuliyat* was executed by several persons it cannot be set aside as a whole, when all the executants did not question it **Raja Pro-**

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—*Daybhaga*—Widow entitled only to maintenance, if can contest the validity of grant to idols or construction of will.

Where the plaintiff being a widow of the testator, is entitled to maintenance and is a stranger to the estate, which, on an intestacy, would go to the adopted son, she is not competent to raise any question as to the validity of certain provisions in the will relating to the establishment and maintenance of certain idols or to have a construction of the entire will. **Promotho**

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SPECIAL BENCH.

Before Sir Francis William Maclean, K. C. I. E., Mr. Justice Rampini, Mr. Justice Brett, Mr. Justice Mitra and Mr. Justice Doss.

SAMARENDRA CHANDRA DEB BARMAN BARA
THAKUR

v.

BIRENDRA KISHORE DEB BARMAN.*

Jurisdiction of Civil Court—Succession to property lying within British territory, dispute as to—Hill Tipperah Raj—Declaration of contingent right, suit for, if maintainable—Specific Relief Act (I of 1877) section 42.

*Held, (Doss J. dubitante).—*The appointment of Jubraj by the Raja of Tipperah is an act of State by a Sovereign Prince and the Municipal Courts cannot question the validity of that appointment.

Beer Chunder Manikya v. Raj Coomer Nobodeep Chunder Deb Burmono (1) followed.

Neelkisto Deb Burmono v. Beer Chunder Thakoor (2) referred to.

Per curiam.—A person cannot sue for a declaration of his legal right unless he has an existing right, and a mere contingent right which may never ripen into an actual existing right is not sufficient to ground an action for a declaration that the defendant has no right of succession to the property.

Appeal by the Plaintiff.

Suit for a declaration that the plaintiff is according to the *kulachar* of the Tipperah Raj family and by virtue of appointment as Bara Thakur by the last Raja entitled to the succession to the property situate in British India.

The facts of the case appear sufficiently from the judgment.

* Appeal from Original Decree No. 174 of 1906, against the decree of Bahu Bepin Behary Mukerji, Subordinate Judge, First Court of 24-Parganahs, dated the 24th January 1906.

(1) (1883) 1 L. R. 9 Calc. 535; 12 C.L. R. 465.

(2) (1866) 13 Moo. I. A. 523 at 531 and 535.

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The case of *Beer Chunder Manikaya v. Raj Coddhar Nabodeep Chunder* (1), is rightly decided.

The case does not come under section 16 clause (d) Civil Procedure Code. It is a pure contingency which may or may not arise. Clauses (a), (b) and (c) of the section are distinguished by the words "any other right to." There is nothing in it to indicate that such right of contingency is dealt with. It is nothing more than *Spes successionis*.

Section 42 of the Specific Relief Act treats of suits for declaration for himself with regard to succession. This suit does not come within the class of suits by reversioners. There is no class of *Jobraj*. Referred to *Musst. Pranputtee v. Lalla Futteh Bahadur* (2). There is a distinction between getting a declaration for his own benefit and a declaration that the act of the widow is not valid. The case of *Greeman Singh v. Wahari Lall* (3), is decisive on the point. Section 42 has no application to cases of contingent rights. The illustration to that section refer to known classes.

Dr. Rash Behary Ghose followed.—The title to the Guddi and Roshunabad is one and the same. Referred to *Nilkishto Burmono v. Beer Chunder Thakoor* (4), *Duke of Brunswick v. King of Hanover* (5). Illbert page 456; Wheaton's International law page 49. As for semi-Sovereign State, see Wheaton page 62. Referred to *Raj Kumar Nabodeep Chunder v. Rajah Bir Chandra* (6).

The plaintiff is not entitled to sue under section 42 of the Specific Relief Act. Referred to *Kattama Nakhier v. Dora Singa Tevar* (7). The judgment in *Greeman Singh v. Wahari Lall* (3), rests on that principle. Referred to Mr. Whitley Stokes Commentary on section 42, Vol. I page 978. The section refers to present and vested right and not to contingent right. See *Bhujendra Bhusan v. Triguna Nath* (8).

The discretion which the Court has, must be exercised with great caution. This is a case in which such a decree should not be given.

Mr. B. Chuckerbutty in reply—Submissions can not give jurisdiction. Only to avoid embarrassment the Raja submitted.

Section 433 Civil Procedure Code deals with procedure. It does not deal with rights.

(1) (1883) I. L. R. 9 Calc. 535.

(2) (1863) 2 Hay. 608.

(3) (1881) I. L. R. 8 Calo. 12.

(4) (1875) L. R. 2 I. A. 169 (172, 174); 15 B. L. R. 83; 28 W. R. 814.

(5) (1882) I. L. R. 8 Calo. 761.

(6) (1869) 12 Moo. I. A. 523 (534).

(7) (1863) 6 Bev. 1; 49 E. R. 724.

(8) (1876) 25 W. R. 404 (405).

(9) (1904) I. L. R. 27 All. 468.

Illustrations (e) and (f) to section 42 of the Specific Relief Act show that the plaintiff is entitled to a declaration. He is not questioning the power of Raja to choose anybody as *Jubraj*. Section 42 does not restrict the power of the Court; but all declaratory suits are discretionary. When the cases of *Katama Natchier v. Dora Singa Tevar* (1), and *Musst. Pranputtee v. Lalla Futteh Bahadur* (2), were decided, the law was different. Section 42 is wide enough to cover the present case. The case of *Greeman Singh* (3), is a very peculiar case. It was dissented from in *Manmatha Nath Biswas v. Rahilli Moni Dasi* (4). In the case of *Greeman Singh* (3), the Judges were dealing with the rival claimants. The plaintiff can get a negative declaration. C. A. V.

Afterwards their Lordships, owing to the importance of the case, referred it to the Special Bench, for disposal.

Mr B. Chuckerbutty (with him *Babus Basant Kumar Bose and Harendra Narayan Mitra*) for the Appellant.

So far as land in British India is concerned, the only tribunal which can decide the title to that, is the British Court. Refers to Sir Charles Atchison's treatise, p. 102 (Ed. 1876). The same view is taken in Mr Mackenzie's book (Ed. 1884) p. 272. See also *Nanabhai v. Shrinan Goswami Girdhariji* (5).

[RAMPINI J—Was there any admission in the plaint as here?]

No amount of admission will do. It is a question of law. For his misconduct he was driven out of Hill Tippera. He was deposed as in the Bombay Case.

Whatever may be the effect of cancellation in Hill Tippera, the law applicable to lands in British India is the law of British India. Referred to *Nanabhai v. Girdhariji* (5) and *Ram Gunga Deo v. Doorgamunee Jobraj* (6).

[BRETT J—There was no question of legality of the Raja's act]

So far as Raja's territory is concerned, he was not asking their Lordships to consider the matter.

See *Urjun Manic Thakoor v. Ram Gunga Deo* (7) and *Rance Soomitra v. Ram Gunga Mayik* (8).

The next case that arose was that of *Beer Chunder Joobraj v. Neelkissen Thakoor* (9). This case went up to the Privy Council; see *Neelkisto Deb Burmono v. Beer Chunder Thakoor* (10).

(1) (1875) L. R. 2 I. A. 169 (172, 174); 15 B. L. R. 83; 23 W. R. 314.

(2) (1863) 2 Hay 608.

(3) (1881) I. L. R. 8 Cal. 12.

(4) (1904) I. L. R. 27 All. 406.

(5) (1885) I. L. R. 12 Bom. 331 (333).

(6) (1809) 1 Sel. Rep. 270 (New Ed. 361.)

(7) (1815) 2 Sel. Rep. 142 (New Ed. 177.)

(8) (1820) 3 Sel. Rep. 40 (New Ed. 54).

(9) (1864) 1 W. R. 177.

(10) (1869) 12 Moo. I. A. 523.

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Deb Barman Bara
Thakur

Birendra, Kishore
Deb Barman.

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ThakurBirendra Kishore
Deb Barman.

[MACLEAN C. J.—The question of jurisdiction was not in dispute.]

At page 534 their Lordships observed as follows :—

"The *Rajah* of *Tipperah*, though in respect to these lands subject to the laws and Courts of *British India*, is in fact an independent Prince with a considerable territory known as the *Tipperah Hills &c*." This passage was relied on. Reads page 538 of the Report. "On the argument of this appeal before their Lordships, the Appellant's preferential title by seniority to the *Jubrajship* was sought to be established by evidence of a family custom to be collected from the instances given in the geneology of actual successions." The other side relies on page 534.

Referred to Mr. Foote's Private International Law 3rd Edition, 1904, page 159 and Wheaton's International Law, 4th Edition, page 159. No authority other than the constituted authority can impose law. See Westlake's International Law, 4th Edition, page 246.

An act of State can not interfere with private property. Land can not be held by a foreign sovereign as a subject. Read Dicey's Conflict of Laws, Edition 1896, page 590 as regards devolutions ; also pp. 38, 223.

Referred to *Goswami Shri Girdhariji v. Madhowdas* (1) and *Shriman Goswami v. Goswami Shri Girdhar Lalji* (2). Two questions were raised in the last case. See page 623 ; submitted that the question of jurisdiction was decided in favour of the contention he was urging.

Referred to *Rajkumar Nobodip Chundro Deb Burmun v. Rajah Bir Chundra Manikya Bahadoor* (3); see page 406 ; *Maharajah Bir Chunder Manikya Bahadoor v. Ishan Chunder Thakur* (4). The suit was against the Maharaja for maintenance.

The next case referred to was *Beer Chunder Manikya v. Raj Coomar Nobodeep Chunder Deb Burmono* (5). There also the question arose as regards right to maintenance. The Raja was a party in that case. He distinguished that case on two grounds : (1) His suit was not against the Raja : (2) The claim for maintenance is not a suit for property, unless and until it is made a charge on the property.

[DR. GHOSE.—That was not a suit merely for maintenance.]

(1) (1898) I. L. R. 17 Bom. 600.

(2) (1878) I. L. R. 17 Bcm. 620 (note.)

(5) (1883) I. L. R. 9 Calc. 885 ; 12 C. L. R. 465.

(3) (1883) 25 W. R. 404.

(4) (1878) 3 C. L. R. 417.

He adopted the argument of Mr. Phillips at page 548. He adopted the third argument there as his first. Read the judgment and pages 555, 556. He submitted that it was not necessary to decide the question of jurisdiction. The observations made therein which go against him were not correct.

Then referred to *Beer Chunder Manikya v. Ishan Chunder Burdhu* (1). That was a suit for recovery of rent and roadcess. The same learned Judges who decided the case of *Beer Chunder v. Raj Coommar* (2) decided this case also. They treated him like an ordinary subject,

Read sections 431 and 432 of the Code of Civil Procedure.

The case of *Hajon Manick v. Beer Sing* (3) was relied on by the lower Court. So far as jurisdiction is concerned, he submitted that the case was in his favour. The suit had to be brought in the British Court.

Read *sanad* dated 1st June 1904. The suit was instituted in March 1904. The *sanad* did not affect him at all.

It is land in British India and it is governed by laws in British India. No person can get any right to any such land by act of State. So far as land in British India is concerned he is entitled to show that his title is superior to that of the defendant. So far as this zemindary is concerned, it is governed by Regulation I of 1793.

Referred to Story's Conflict of Laws, para. 427 and Chap. XIV p. 539.

The next question is : "Is it a suit for land within the meaning of section 16 cl. (d) of the Code of Civil Procedure ?" The ground on which this was decided against him was that cl. (d) must refer to suit of same nature as cls. (a), (b) and (c). The words are "for the determination of any other right to," are wide enough to include such a case as this. Referred to the case of *The Delhi and London Bank v. Wordie* (4). The plaintiffs are entitled to succeed in preference to the defendant.

Then referred to *Kellie v. Fraser* (5). There at page 463 it was said. "It will be observed, however, that in all, or almost all, the cases upon which the appellant relies, the suit was brought for the purpose of acquiring the possession of, or of establishing a title to, or an interest in, the property which was the subject of dispute, more particularly in the case of *The Delhi and London Bank v. Wordie* (4), where the object of the petitioner was to

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(1) (1883) I. L. R. 10 Calc. 136

(2) (1893) I. L. R. 9 Calc. 535

(3) (1894) I. L. R. 11 Calc. 17

(4) (1874) I. L. R. 1 Calc. 249

(5) (1877) I. L. R. 2 Calc. 445

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Manick v. Beer Sing (1). In it the case of *Beer Chunder Manikkya v. Rajkumar Nobodeep Chuuder Deb Burmono* (2) was referred to.

There is an exception to land of the State which never dies. A question as to extent of territory cannot be settled by Municipal Court but by diplomatic action. The Court having jurisdiction must stay its hand as soon as it sees that it is a question as regards declaration.

Bir Chunder and Nilkristo were both recognized. They were interested to see that the question was decided one way or the other. See page 553 of the case of *Beer Chunder Manikkya v. Raj Kumar Nobodeep Chuuder Deb Burmono* (2). The judgment of Macpherson J. is no authority on a question of fact. See 12 M. I. A. p. 534.

The *Rubakari* appointing the defendant *Jubaraj* clearly shows that the zemindaries are part of the Royal possession. The *Sanad* shows that also.

The Bombay cases referred to by the other side lay down an elementary proposition, *viz.*, no foreign sovereign by any act of its own nor any foreign Court by any judgment can affect land outside the State. This is an act of the State and sought to be set aside by the subject of the Raja. The plaintiff is not entitled to do so.

In *Beer Chunder Manikkya v. Raj Koomar Nobodeep Chuuder Deb Burmono* (2) it was observed as follows:—
“We further observe that for our Courts to entertain the plaintiff's suit and declare him *Jubaraj* would, if operative at all, have the effect of annulling the Maharajah's appointment of his own son as *Jubaraj*; but this appointment was an act of sovereignty performed by the Maharajah in his own territory, and as such it clearly cannot be questioned or set aside by the Courts of British India.” What is the plaintiff's cause of action? He comes into British Court and asks that his own sovereign had no power.

The next point is that under the Code of Civil Procedure, the Alipur Court has no jurisdiction. This depends upon whether the plaintiff is entitled to a declaratory decree. According to his own showing, the plaintiff is only entitled to a contingent interest. Under section 6 of the Transfer of Property Act a mere right to succession is not property at all.

(1) (1884) I L. R. 11 Calc. 17 (24).

(2) (1883) I. L. R. 9 Calc. 535; 12 C. L. R. 465.

A person who stands in the position of a reversioner is not entitled to a bare declaration. The Courts might determine any existing right but would not determine any contingent right. See *Mussamut Pranpotee v. Lalla Futteh Bahadur* (1).

[BOSS J.—It is not a declaration of right but a declaration of a possibility of a right.]

This case is approved in *Kattama Natchiar v. Dora Singa Tevar* (2). Read pages 189, 190, 191. In this case their Lordships distinguished the well-known classes of cases. The case of *Greeman Singh v. Wahari Lall* (3) cannot be distinguished. The judgment is perfectly sound. The Allahabad and Madras High Courts misunderstood the ruling. See *Bhujendra Bhusan v. Trigunanath* (4). At page 765 Mr Justice Wilson observed as follows :— "And I do not purpose to attempt to lay down any general rule, beyond this, that I think the discretion ought to be exercised with great caution. I have no doubt, however, that the present case is not one in which a declaratory decree ought to be given. To hold otherwise would be to lay down that any one who claims any interest in property, present or future, ought to be allowed to ask the Court to give him an opinion on his title, and it cannot, I think, have been the intention of the Legislature to lay down any such rule." See also *Pirithi Pal Kunwar v. Guman Kunwar* (5).

Mr. Chuckerbutty in reply—The act of the State was after suit. The *sanad* of British Government was after suit.

An appointment by the Raja of the defendant affecting land in British India has no validity at all.

[BRETT J.—The question is whether British Court has any jurisdiction over lands in British India.]

Submitted that he was not seeking to set aside the appointment. His position is exactly like that of a reversioner.

C. A. V.

The following judgments were delivered.

Macleay C. J.—The plaintiff seeks in this suit for a declaration that he is according to the *kolachar*, custom or usage of the Tipperah Raj family, and by virtue of the appointment referred to in his plaint, entitled to the succession to the scheduled property from and after the demise of the present

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(1) (1863) 2 Hay. 608; Syvester 279.

(2) (1875) L. R. 2 I. A. 169; 15 B. L. R. 83; 23 W. R. 314.

(3) (1881) 1. L. R. 8 Cal. 12.

(4) (1882) 1. L. R. 8 Cal. 761.

(5) (1890) L. R. 17 I. A. 107; 1 L. R. 17 Cal. 933.

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Raja of Tipperah, and that the defendant has no right of succession thereto. That is the object of the suit.

The property scheduled to the plaint lies within British territory : and, part of such property consists of a house and lands in the Ballygunj Circular Road known as "Green Park" within the local limits of the Alipur Court.

The plaintiff is a son of the late Raja of Hill Tipperah. According to his case, the Raj family of Hill Tipperah of which the Raja is the head, is governed by the Hindu law as obtaining in Bengal, except in so far as that law is modified by the custom of the family, by which the reigning Raja may nominate and appoint from amongst the legitimate members of the Raj family his two next successors, the first successor being styled *Jubraj* and the second successor being styled Burra Thakur. The plaintiffs' case is that, according to the said custom, the said appointments fix irrevocably the succession in the parties nominated, and the *Jubraj* so appointed is indefeasibly entitled to succeed, on the demise of the reigning Raja who appointed him, to amongst other things, the scheduled property ; and the Bara Thakur so appointed is indefeasibly entitled to succeed to such property on the demise of the *Jubraj*. It is undisputed that the scheduled property follows the succession to the Hill Tipperah Raj, or, as the defendant puts it, forms part of their royal possession and the right and title to such property follows the possession of and succession to the throne, and is enjoyed by one and the same title.

In the year 1870 the late Rajah appointed his eldest son Raja Radha Kishore Deb Burman, the present Raja, *Jubraj*, and in the year 1878 appointed the plaintiff Burra Thakur. The late Raja died on the 11th of December 1896 : and, the present Raja succeeded to the throne of Hill Tipperah as also to the scheduled property. It appears that, by an instrument under his sign manual and the seal of his State, dated the 8th of February 1899, the Raja appointed and constituted the present defendant his *Jubraj*, and caused the said appointment to be notified to the officers of the state for their information and guidance, and to be communicated to the Government of India. The plaintiff objected to this appointment : and challenges its validity, alleging that the defendant is illegitimate. It appears that on the 9th of June 1899, he memorialized the Government of Bengal against such appointment, but unsuccessfully. The Government of Bengal rejected the plaintiff's memorial. In these circumstances

the plaintiff instituted the present suit on the 9th of March 1904 in the Subordinate Judge's Court of Alipur and asked for the declaration I have stated.

The defence is that the present Raja is the Ruler of the Sovereign State of Hill Tipperah whose succession to that State *de facto et de jure* has been recognised by the Government of British India, and that as such Sovereign Prince, the said Raja holds and by right of his succession to the throne of the said State, enjoys, as part of his royal possessions, the properties specified and described in the schedule to the plaint, the said Raja's title to the throne of Hill Tipperah and to his Royal possession both without and within British India Territory being one and the same, and the latter an appanage to the said throne following the course of succession thereto. The defendant also alleges, and this is not disputed, that the British Government has, as paramount power, conferred a *sanad* upon the present Raja affirming his absolute freedom in the choice of his own *Jubraj* or successor to the Raja and *zemindaries* and other property in British India which appertain thereto and are held therewith, and that after the receipt of the Sanad, the said Raja has by a *Rubakari* dated the 22nd of July 1904 confirmed the appointment of the defendant as his *Jubraj* or immediate successor. The defendant's case further is that, each reigning Raja is, after his succession to the throne, empowered of his own absolute and free choice to nominate and appoint a member of the Royal family to be his own immediate successor under the title and designation of *Jubraj*, who, on such nomination and appointment, becomes entitled to and does, if alive on the death of the Raja by whom he was so appointed, succeed to the Crown and kingdom of Hill Tipperah and, with such kingdom, to the royal possessions thereof, whether situate in Hill Tipperah or British India, including the scheduled property. There appears to be no doubt even upon the plaintiff's own plaint that the scheduled property forms part of the royal possessions of the Hill Tipperah Raj, and follows the succession to the Raj. It is further alleged by the defendant, though it has not been proved, that the Raja in the exercise of his sovereign rights, on the 30th of June 1900, for reasons of State, cancelled the appointment of the plaintiff as Bara Thakur.

The Subordinate Judge has dismissed the suit, holding in effect that it is not competent for him to go into the question of the rights of succession in the Hill Tipperah Raj. The plaintiff has appealed.

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It is not disputed by the defendant that the scheduled property by reason of its being situated within British Territory is subject to its Territorial Law affecting the same. But his contention is that the Courts in British India cannot go into the question of the right of succession to the Raj. Although the prayer of the plaint is as I have stated, the real object of the suit is to set aside the appointment by the present Raja, dated the 8th of February 1899, of the defendant as his *Jubraj*. It is difficult to see how such a question can be dealt with by the Subordinate Judge at Alipur or by any Court in British India. The appointment of the defendant was an act of State by a Sovereign Prince, and when it is once established in this suit that this appointment has been made, it is difficult to see how the lower Court could have gone into the question of the validity of that appointment, and, least of all, in the absence of the Raja who is not a party to the suit, and who is most interested in maintaining the validity of the appointment of his son, the defendant, as *Jubraj*. If he had been made a party to the suit, he would presumably have demurred to the jurisdiction. In our opinion the Court at Alipur had no jurisdiction to decide who is the *Jubraj* of the Foreign State of Hill Tipperah. It has not been disputed that Hill Tipperah is a Sovereign State, in that it governs itself without dependence on any foreign power. The right of the Raja to appoint the defendant has been recognized by the *Sanad* of the Viceroy and Governor General of India dated the 21st of June 1904, in which it was declared that the Chief of the Hill Tipperah State for the time being might, from time to time, and at any time, nominate and constitute any male member of the family descended * * * * through males from him or any male ancestor of his, to be his *Jubraj* or successor to the Chiefship. No doubt in several cases—and reference may be made especially to the case of *Neel Kristo Deb Burmono v. Beer Chunder Thakur* and others (1), the parties interested did, at the instance of the Government of India, leave it to the British Courts to decide, from time to time the question of the right of succession to this Raj. But in all these cases the parties interested submitted to the jurisdiction of the Court, and the question of jurisdiction was, apparently, never raised. In the case of *Neel Kristo Deb Burmono v. Beer Chunder Thakur* (1), their Lordships of the Judicial Committee say this (pages 534-535). The Rajah of Tipperah though in respect to

(1) (1869) 12 M. I. A. 523.

these lands subject to the laws and Courts of *British India*, is in fact an independant prince with a considerable territory known as the Tipperah Hills, and as the title to the *zemindary* and to the Raj is the same, the dispute respecting the former involves a question of the right of succession to the *Musnud* or Throne of the independent Principality. The respondent, Beer Chunder Thakur, has been acknowledged by the British Government as *de facto* sovereign of Tipperah, but this acknowledgment has been regarded in the Court below as determining nothing more than his present and actual possession of the Throne, and their Lordships will deal with the question between the parties as if the litigation were between two ordinary subjects of the crown upon a disputed title to lands with the jurisdiction of the Indian Courts." And later on at page 543 they say this: "This contest is in truth a contest as to the title to reign; a matter, rather of State policy than one proper for Judicial decision." That case is no authority for the proposition that if the question of jurisdiction is raised, the Courts in British India have any right to decide the question as to who is entitled to succeed to the Raj of a foreign sovereign State.* In the case of *Beer Chunder Manikkya v. Raj Coomar Nobodeep Chunder Deb Burmono* (1), the Judges say "We further observe that for our Courts to entertain the plaintiff's suit and declare him *Fubraj*, would, if operative at all, have the effect of annulling the Maharaja's appointment of his own son as *Fubraj*; but this appointment was an act of sovereignty performed by the Maharaja in his own territory, and, as such, it clearly cannot be questioned or set aside by the Courts of British India. Under the circumstances we do not think that this claim could be entertained by our Courts."

As has already been pointed out, the real object of this suit is to set aside the appointment by the present Rajah of the defendant, his son, as *Fubraj* and successor, and the question here is practically the same as that which was dealt with in the case last cited. The passage quoted applies to the present case and we adopt it.

For these reasons the appeal must fail.

Apart however from this, there are other difficulties in the path of the appellant. It is contended for the respondent that no such declaration as is asked for can properly be made under section 42 of the Specific Relief Act. The plaintiff has no

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present interest ; he may never have any interest in the Raj or the property. Even assuming the appointment of the defendant as *Jubraj* to be invalid, the plaintiffs' interest in the Raj and in the scheduled property is contingent upon his surviving the present Rajah : and, it has not been seriously pressed that he is entitled to the affirmative portion of the declaration sought. But it is contended that he is entitled to the negative portion, namely that the defendant has no right of succession to the scheduled property. If the view expressed above that the Court has no jurisdiction to go into the question of the succession to the Raj be sound, it is scarcely necessary to discuss this point. In our opinion a person cannot sue for a declaration of his right unless he has an existing right, and a mere contingent right which may never ripen into an actual existing right is not sufficient to ground an action for such a declaration. As regards that part of the declaration that, "the defendant has no right of succession thereto," the plaintiff's case is that the defendant is illegitimate, and so could not be properly appointed *Jubraj*. We do not think that a declaration, dependent upon such an issue, ought to be now made at the instance of the plaintiff who, should he die during the life of the present Rajah could gain no advantage, even if the issue were decided in his favour : and, in the exercise of the Judicial discretion which is vested in the Court under the section, we should not be disposed to make any such declaration : nor do we think that such a declaration can properly be made in the absence of the Rajah, who is deeply interested in the question. But this question really becomes immaterial in view of the opinion expressed above upon the question of jurisdiction.

The appeal is dismissed with costs.

Rampini J.—I agree.

Brett J.—I agree.

Mitra J.—I agree with the learned Chief Justice.

Doss J.—The points in controversy between the parties are chiefly questions of law, of unusual importance, and somewhat difficult to solve, but the facts which raise them are few and undisputed, and they lie in a narrow compass.

Chakla Roshanabad lying on the eastern borders of Eastern Bengal and comprising an area of 589 square miles is held by the Raja of Hill Tipperah as an ordinary zemindary under British Government, and paying a certain amount of revenue

fixed at the time of the permanent settlement of Bengal. (See Aitchison's Treatise Ed. 1876, Vol. I, p. 101, Hunter's Statistical Account, Vol. VI, p. 460). The Raja also owns a residential house in the suburbs of Calcutta.

The Raj family of Hill Tipperah is governed by Hindu Law, except in so far as that law, as regards inheritance, is modified by the *kulachar* or family custom, under which the reigning Raja nominates and appoints from among the legitimate members of his family his two next successors, the first being styled *Jubaraj* and the second Bara Thakur.

In accordance with this custom Maharaja Bir Chunder Deb Barman in the year 1870 appointed his eldest son Radha Kishore Deb Barman as *Jubaraj* and in the year 1878 his second son, the plaintiff, as Bara Thakur.

On the death of Maharaja Bir Chunder Deb Barman, Radha Kishore Deb Barman, the *Jubaraj*, became the Raja, and he on the 8th February 1899, under a *rubakari* of that date, appointed the defendant Birendra Kishore Deb Barman as *Jubaraj*. Thereupon the present plaintiff submitted a memorial to the Government of India, claiming that the nomination of defendant as *Jubaraj* was illegal, and that he himself should be promoted to that rank. This memorial was rejected by Government and its order was communicated to the present Raja on the 8th December 1902.

On the 9th March 1904, plaintiff brought the present suit, alleging that the defendant is not the legitimate son of the Raja, and submitting that the appointment of the defendant as *Jubaraj* (a fact which he denied) if made, is invalid, and asked for a declaration that according to the *kulachar* or custom of this Raj family, and by virtue of his appointment as Bara Thakur, plaintiff is entitled to the succession to the scheduled properties (these being properties situated in British India and referred to above) from and after the demise of the Raja, and that the defendant has no right of succession thereto.

On the 21st June 1904 (*i.e.* more than three months after the institution of this suit) the Government of India granted a *sanad* to the present Raja, with the object, as therein stated, of removing all doubts as to the rule of succession to the chieftship of the State of Hill Tipperah, and the ownership of the zemindaries and the other property in British India, appertaining thereto, and declaring *inter alia*, "That the chief of the said State for the time being may, from time to time, and at any

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time, nominate and constitute, any male member of the said family, descended through males, from him or any male ancestor of his, to be his *Jubbaraj* or successors to the said chiefship."

Upon receipt of this *sanad*, the Raja on the 22nd July 1904, confirmed the appointment of defendant as *Jubbaraj*, i.e. as his successor. The Court below has held that as the scheduled properties, even if situated in British India, form the public property of a foreign sovereign, the Courts in British India have no jurisdiction to entertain this suit. It has further held that the suit cannot proceed in the absence of the Raja, and that the plaintiff is not entitled to a declaration of the nature he has asked for. It has accordingly dismissed the present suit without trying the other issues raised in the case.

From this judgment the plaintiff has appealed.

It has not been disputed by the learned vakil for the respondent that the municipal Courts have jurisdiction to entertain a suit in regard to land situated in British India, even if it be owned by a foreign sovereign, as the property of the State of which he is the sovereign. The law on this point is too firmly settled to be questioned now. See *The Charkich* (1), Halls' Int. Law 5th Ed., page 171, and the authorities cited therein; Bar's Private Int. Law, translated by Gillespie, (2nd Ed.), pages 910 and 1113.

But it has been contended that, even supposing that the municipal Courts have jurisdiction in a case of this kind, yet when the question is one of succession to the property on the demise of the owner, such owner being a foreign sovereign, the law which the Courts must administer and give effect to, in order to determine who the next successor is, is the foreign law (the law regulating succession to the chiefship of the foreign state), *qua* foreign law. I confess I feel some difficulty in following this argument. When the question relates to title to immovable property (and succession is only a mode of acquiring title), the only law which the municipal Courts can administer is the *lex situs*, and in all the decided cases relating to succession to Chakla Roshanabad ever since 1809, the Courts in British India (if I have been able to rightly apprehend the judgment of the Privy Council in *Neelkisto Deb Burmono v. Beer Chunder Thakoor* (2), have invariably administered the personal law of the Hindus modified by *kulachar* or custom of the Raj Family of Hill Tipperah, just as in the case of other impartible

(1) (1873) L. R. 4 Ad. and Ecc. 59 at 97.

(2) (1889) 12 M. J. A. 523.

zemindaries situated in British India (similarly governed in matters of succession by local or family custom), not as a law of the foreign state but as a branch of the laws of British India, *albeit* that custom derived its force and validity as such law by virtue of judicial authentication. But even assuming that this contention is correct, it does not help the respondent in this case, because it does not follow from it that in a case of disputed succession, the municipal Courts are not to administer the law and determine who has the preferential right to succeed, according to that law, but merely to register the decree, so to speak, of the foreign sovereign, however opposed to such law in any individual case the decree might be; and indeed nothing short of this, as it seems to me, would meet the exigencies of this contention. The appointment of defendant as *Jubbaraj* by the reigning Rajah cannot be placed on a higher footing than a decree by him to that effect, for if it be regarded as an Act of State exercised by the Rajah, its operation cannot be extended beyond the limits of Hill Tipperah.

It has next been contended that by reason of the rejection by Government of the memorial of the plaintiff and the grant of the *sanad* after suit, prescribing the mode of future succession to the Chiefship of the State and the ownership of the zemindaries and the other property in British India, the Courts in British India are precluded from adjudicating the validity or otherwise of the appointment of defendant as *Jubbaraj* or rather as the next successor to the ownership of the zemindaries or other property in British India, as well in a properly framed suit, asking for appropriate consequential relief to which the plaintiff might otherwise be legitimately entitled, *e. g.*, in a suit in ejectment, as in a suit for a mere declaratory decree.

To my mind, this contention raises a serious question of constitutional law, namely, whether the State, in the exercise of its executive functions, can settle a question of disputed succession to land forming part of its territory, and thereby oust the municipal Courts of their jurisdiction to decide it, without encroaching upon its legislative functions, or derogating from its legislative powers.

But as the determination of this question is not absolutely essential to the decision of this case, I abstain from discussing, or expressing any opinion on it. I rest my judgment in the present case on the sole ground that, regard being had to its nature, plaintiff is not entitled to the declaration asked for.

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which a decree has been made in a mortgage suit in which Srimati Tarangini was defendant, and to have it declared that she has no right in those properties and that they are not liable to be sold by auction under the decree. The suit was decreed in the first Court, and that decision was upheld on appeal. The case is now before us on second appeal, and several points have been argued of which however I need notice only one, namely that the property is not *debutter*. If the appellant succeeds in this contention as I am of opinion that he must, the plaintiff's case fails and this appeal must succeed.

The *debutter* if validly constituted is created by an arpannamah executed by Tarangini Dasee on the 14 Kartik 1303, (29 October 1895). By this she recites that her husband died after making a will in her favour, that she has taken out probate of the will, that she has been duly performing sheba of her husband's ancestral idols, and that she has installed an idol named Luxmi Janardan Jiu in her house, and now wishes to make provisions for its worship. She then details certain properties which she has received under her husband's will including the property now in question, and assigns their income to the support of the idol. The question is whether under the terms of her husband's will she had power to make this dedication. The contents of the will so far as they affect this question are as follows: The testator recites that he had wished to take a son in adoption for offering cakes and water to his ancestors and himself. He then makes his wife "malik in rightful possession" or "malik entitled to ownership" of certain property, including that in dispute. There then follow provisions as follows. *First* out of the income of the properties demised she shall perform the sheba and certain festivals for the family idol. *Secondly* "you will be able if you wish to endow (*i.e.* dedicate) any property for the sheba and ceremonies etc. of the said idol" at least as far as the income is concerned. *Thirdly* "if for any reason it becomes necessary for you to sell or make a gift of those properties" she may. *Fourthly* she may adopt a son, during his minority she is to remain in possession of the properties left by the testator, and perform the acts mentioned, and "after the son has attained the age of majority, you shall make over the properties to him. *Fifthly* after the testator's death you, on becoming malik in possession of all the properties left by me shall take a son in adoption (or by taking a son in adoption), and the said adopted son" and his heirs shall hold and enjoy the properties.

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The bequest to the wife as malik is no doubt in terms sufficient to confer on her powers wide enough to enable her to dedicate the property as she purported to dedicate it. But we must consider the effect on it of the provisions that I have distinguished by numbers. The first I have no doubt must be read as a derogation from the completeness of the grant conferred, and operates as a charge on the property; certainly as long as it is in Tarangini's hands, for the benefit of the family idol. It is suggested to us on behalf of the respondent that it is merely a pious direction sanctioned by the injunction that "failing to perform these you shall fall from the path of religion;" this reading seems to me however to be contrary to the form and inconsistent with the purpose of the will. The second provision enabling the devisee to dedicate property to "the said idol" is superfluous if the previous bequest to her was absolute, and the same remark applies to the third provision enabling her to sell the property in case of necessity. The fourth and fifth provisions, especially when read with the recital of the testator's wish to adopt a son, amount substantially if not in words to a direction to adopt and looking to the ultimate bequest to the adopted son and his sons, it is quite impossible to maintain that any absolute devise was made to Tarangini. Under these circumstances I must hold that she took a limited estate under the will, that as far as the will is concerned her powers of alienation were confined to the dedication of property for the benefit of the ancestral idol and the alienation of the property in case of necessity. Consequently the dedication that she has made, to her own idol, is invalid, and the property in suit is not *debutter*. The foundation of the plaintiff's case thus fails, and the decrees in the lower Courts must be set aside. Looking, however, to the facts as found by the lower Courts particularly that the mortgagee knew, that he was dealing with property that was the subject matter of what purported to be a dedication, and that the mortgage was not *bona fide* and for consideration, we do not consider that he is entitled to his costs in this appeal. We, therefore, make no order as to the costs of this appeal, but the plaintiff must pay the defendants his costs in the Courts below.

Mookerji J.—The subject matter of this litigation consists of certain immovable properties which formed part of the estate left by one Mohendra Nath Chowdhuri, who died on the 27th January 1886. He had previously made a testamentary disposi-

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tion of his properties on the 22nd January 1886. Under the will the testator appointed his widow Tarangini Dasi as Executrix. On the 29th October 1895, the widow dedicated the properties now in dispute to Thakur Luxmi Janardan Jiu established by herself. On the 6th August 1899, the widow executed a mortgage of the same properties in favour of the present appellant, and thus dealt with the properties apparently in her character as executrix to the estate of her husband. The mortgagee subsequently instituted a suit to enforce his security and on the 23rd October 1903, a decree was made by consent on the basis of the mortgage. The decree-holder took out execution and in the course of the execution proceedings, Tarangini preferred an objection that the properties could not be followed in execution of a personal decree against her as they had been previously dedicated and constituted a complete *debutter*. This objection was over-ruled and execution was directed to proceed on the 19th September 1904. On the day following, Tarangini in her character as *shebait* of Thakur Luxmi Janardan Jiu commenced the present action for declaration that the disputed properties had been validly dedicated to the Thakur and that they were consequently not liable to be sold at auction on account of her own debts. The Courts below have concurrently made a decree in favour of the plaintiff. The defendant has now appealed to this Court and on his behalf the decision of the learned District Judge has been assailed substantially on two grounds : namely, *first*, that the suit is barred under the provisions of section 244, Civil Procedure Code and *secondly*, that upon a true construction of the will of Mohendra Nath, his widow had no authority to dedicate the properties in question to the Thakur. After a careful consideration of the arguments which have been addressed to us on both sides, I am of opinion that the first contention must be over-ruled but that the second must prevail.

In support of the first branch of his argument, the learned Vakil for the appellant has placed reliance upon the cases of *Be Raj Marwari v. Kundali Debya* (1) *Rangan Pattar v. Lakshmi* (2) *Ramanathan v. Levvai* (3) and *Marivittil Mathu Amma Pathram Kunnot Cherukot* (4). The learned vakil for the appellant however, could not dispute that although some of the cases relied upon by him lay down the principle that an objection by a defendant judgment-debtor that the immovable property attached,

(1) (1902) 8 C. W. N. 353.

(2) (1903) 14 M. L. J. R. 187.

(3) (1898) I. L. R. 23 Mad. 195.

(4) (1906) I. L. R. 30 Mad. 215.

execution of a decree is not his private property and that he is in possession thereof as a trustee falls within the scope of section 244, Civil Procedure Code; the contrary view has been maintained in the cases of *Bhajañari Pal v. Ram Lal Dās* (1), *Ram Krishna v. Mohun Padma Charan* (2) and *Sankaralinga v. Kandasami* (3). It is not necessary, however, in the present instance to consider which of the conflicting rules laid down in the two series of cases to which reference has been made is well founded on principle and is consistent with the provisions of section 280, Civil Procedure Code, because in my opinion none of the cases is directly applicable to the circumstances of the present litigation. The decisions relied upon were of cases of execution of decrees for money whereas the case before us is one of execution of a mortgage decree. As was pointed out by this Court in the case of *Khetra Pal v. Shyama Prosad* (4), section 244 has no application to a case where the judgment-debtor tries to set aside the effect of the decree itself. In the case of a mortgage decree, the decree itself directs the sale of the property and if objection is taken that the property cannot be sold because it belonged not to the judgment-debtor but to a party who is a stranger to the suit, the propriety of the decree itself is called in question. Obviously, a question of this description must be tried in a regular suit and not in the execution proceedings which are based on the assumption that the decree is a good and valid decree. It may further be observed that there is no substance in the objection taken by the appellant, for as the Court in which the present suit has been instituted is the Court which is competent to execute the decree, and as no question of limitation arises the objection would be successfully met if the plaint was treated as an application under section 244 Civil Procedure Code, on the principle explained by Sir Richard Couch in *Furmesuree Bershad v. Jankee Koor* (5) and since then repeatedly followed in this and other Courts; (*Biru Mahata v. Shyama Churn* (6)). The first objection taken on behalf of the appellant can not consequently be sustained.

The second ground upon which the propriety of the decision of the Courts below is challenged turns upon the construction of the Will of Mehendranath and the point in controversy between the parties is, whether under the testamentary instru-

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(1) (1901) 6 C. W. N. 63.

(2) (1902) 6 C. W. N. 663.

(3) (1907) 17 M. L. J. 334; I. L. R. 30 Mad 413.

(4) (1904) I. L. R. 32 Cal. 265.

(5) (1872) 19 W. B. 90.

(6) (1825) I. L. R. 22 Cal. 493.

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is used a second time. In that clause, the widow is made "malik" and owner of all the properties left by the testator; at the same time, in the event of an adoption, the testator directs that the adopted son with his sons and grandsons as heirs in succession shall hold and enjoy the properties; this obviously conveys a heritable and alienable estate to the adopted son and is inconsistent with the theory that the widow also takes an absolute interest. If we look, therefore, to all the clauses of the Will as we must and give effect to all the clauses, ignoring none as redundant or contradictory, there is ample indication in the context to displace the presumption of absolute ownership implied in the word "malik" and to justify the conclusion that the gift in favour of the widow must be cut down to something less than a full proprietary right with power of alienation. The testator expressly authorised the widow to dedicate properties for the maintenance of the family idol but he does not appear to have contemplated the possibility of installation of another idol by the widow and the dedication of his properties for the purposes of an idol so consecrated. We are consequently driven to the conclusion that the properties the title to which is now in controversy were not validly dedicated and that the dedication which is the foundation of the present action must be treated as an unauthorised alienation. The result therefore is that the title on the basis of which this action was commenced entirely fails and the suit must consequently be dismissed.

The appeal is allowed, and the decree of the Court below is discharged with costs to the successful defendant to the extent indicated in the judgment of my learned brother.

Appeal allowed.

Before the Hon'ble R. F. Rampini, Acting Chief Justice and
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May, 22, 27.

Occupancy holding, non-transferable, mortgage of—Landlords, purchaser in execution of money-decree, if can question the transferability—Estoppel—Evidence Act (1 of 1872). Sec. 115, if exhaustive—Transferability, question of.*

The landlords of a non-transferable occupancy holding, who purchased the holding at a sale held in execution of a money decree, can resist the claim of the mortgagee of the said holding on the ground of its non-transferability without their consent. The English law of mortgage is not applicable to such a case.

The law of estoppel in force in India is contained in section 115 of the Evidence Act.

The question of transferability properly arises in such a case

Ayenuddin Nasir v. Sris Chandra (1) distinguished.

The dictum in the case approved.

Appeal by the Defendants Nos. 6 to 11.

Suit to enforce a mortgage bond by sale of non-transferable occupancy jotes.

The facts of the case and arguments appear sufficiently from the judgment.

Babus Mahendra Nath Roy and Girija Prosonno Roy Chowdhury for the Appellants.

Dr. Rash Behary Ghose and Babu Hari Charan Sarkel for the Respondent.

C. A. V.

The judgment of the Court is as follows :

This appeal arises out of a suit brought by a mortgagee to realise his debt by the sale of the mortgaged property. The mortgaged property unfortunately for the mortgagee consists of 4 non-transferable occupancy jotes.

The lower appellate Court has found that the defendants 6 to 11, who are the purchasers of the jotes at a sale held in execution of a money decree and who are also the landlords of the jotes are estopped from pleading that the jotes are not transferable. It has therefore given the plaintiff a decree.

The defendants 6 to 11 appeal. They contend firstly that they

* Appeal from Appellate Decree No. 1031 of 1906, against the decree of W. S. Coutts Esq., District Judge of Faridpore, dated the 6th March 1906, affirming that of Babu Purna Chandra Chowdhry, Additional Subordinate Judge of Faridpore, dated the 29th August 1905.

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never represented that the jotes were transferable without their consent and *secondly*, that their conduct in no way amounted to an estoppel.

The facts are that in 1894 the defendants 6 to 11 sold the 4 jotes in execution of a money decree. The jotes were purchased by one Banwari Lal Ghose, who however did not take possession. He re-sold the jotes to the former tenants who apparently obtained the money to buy them back from the father of the plaintiff, to whom they mortgaged the jotes on the 21st September 1898; subsequently, the defendants 6 to 11 again sold the jotes in execution of a money decree, obtained by one Mahim Chandra, Shaha, who had a money decree against the tenants. The defendants 6 to 11 attached this decree, executed it and themselves became the purchasers.

The District Judge says: "In this case they were appearing not in the character of landlord, but as ordinary purchasers and in order to realise their dues they sold up the jotes. By doing so, they raised the presumption that the holding was transferable. Having done so and got their relief, I do not think they can now come forward in another capacity and say that the holding is not transferable."

The learned pleader for the appellants contends that the defendants 6 to 11 never represented that the jotes were transferable without their consent. By selling them, they represented only that they were transferable with their consent.

He further urges that they bought the jotes in May and July 1899, and the plaintiff's mortgage was executed on the 21st September 1898; so there was no estoppel *in pais*.

We must admit the force of these arguments. Dr. Rash Behary Ghose for the respondents replies that the provisions of section 115 of the Evidence Act are not exhaustive, that according to English Law, the defendants by their purchase in 1899, only purchased what the mortgagors had to sell, *viz*, the equity of redemption, and that they are therefore now in the place of the mortgagors, and so can not in equity resist the claim of the mortgagee, and finally on the strength of a ruling reported in 11 C. W. N 76 that the question of transferability does not arise in this case. He further urges as a cross objection that the plaintiff has a mortgage over the 16 annas of the jotes and not over only a 9 annas 4 pies share in them.

We are of opinion that the English Law of mortgage is not applicable to this case. The law of estoppel in force in

this country is contained in section 115 of the Evidence Act. The appellants are clearly not estopped from pleading and proving, as they have done, that the jotes are not transferable without their consent. That being so, the plaintiff's mortgage is of no avail. The case of *Ayenuddin Nasya v. Srish Chandra Banerjee* (1) on which the learned pleader for the respondent relies has no application to this case. In that case, the contest was between a mortgagee and the purchasers of jotes sold at the instance of certain co-sharer landlords, who bought only the right, title and interest of the tenant. None of the landlords were parties to the suit. The facts of the present case are entirely different. But in that case it is said: "No doubt if the question was between the assignee of the interest of Dharmodas, the tenant," (as is the case in the present suit) "and the landlord, the plaintiff could not recover without proving that they were transferable according to custom and usage." So that according to this *dictum* the question of the transferability of the jotes does arise in this case; we must, therefore, decree this appeal, which we accordingly do with costs. The cross appeal only arises if the appeal is unsuccessful. When we hold that the plaintiff is not entitled to anything, it is immaterial what share of the jotes he would have a right to, if his mortgage had been valid.

The cross appeal is, therefore, dismissed.

A. T. M. *Appeal allowed; Cross appeal dismissed.*

(1) (1906) 11 C. W. N. 76.

Before Mr. Justice Woodroffe and Mr. Justice Cox.

MIDNAPORE ZEMINDARI CO. LTD.,

v.

GOBINDA MAHTO AND OTHERS.*

Civil Procedure Code (Act XIV of 1882), Sections 440, 443—Representation of minor plaintiff—Leave of Court—Certificated guardian not appointed—Compromise—Court to decide if for benefit of minors.

Where the mother of a minor is allowed by the Court to act for her son, it is a fair inference that she was appointed guardian by the Court, even though there is no formal order in the record, so appointing her.

Where the Court acts in contravention of Section 443, Civil Procedure

* Appeal from Appellate Decree No. 1058 of 1903 against the decision of Babu Sarash Chandra Ghose, Subordinate Judge, Midnapur, dated the 24th February 1905, affirming that of Babu Manmatha Nath Bose, Munsiff, dated the 26th September 1904.

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Codé and overlooking the claims of the certificated guardian appoints somebody else, guardian of the minor, it is a mere irregularity.

Dammar Singh v. Pirbhu Singh (1), approved and followed.

Even though there be no order which states in so many terms, that the Court has considered the compromise and held it to be for the benefit of the minors, it must be assumed, in the absence of evidence to the contrary, that the Court did its duty in the matter.

Appeal by the Defendant.

Suit for rent.

The necessary facts and arguments appear from the judgment.

Babu Jogesh Chandra Roy for the Appellant.

Babu Joy Gopal Ghosha for the Respondents.

The judgment of the Court was delivered by

Woodroffe J.—The first question which arises in this appeal is whether the minors were properly represented in the suit in which a compromise decree was passed on the 12th August 1899.

There is no doubt that the minors must be represented and that if they are not represented, the decree passed in such a suit is liable to be set aside.

In the present case, it is said that the minors were represented by Badan Mani who was the mother of one of the minors, Uchit Mahato. Now it is quite true that there was no formal order in the record appointing Badan Mani; but I think it is a reasonable inference from the documents which have been placed before us that the Court in fact assented to the appointment of Badan Mani as guardian. We find a reference to this guardian in the plaint in that suit, and in the order sheet of the 26th June 1899 there is an order directing notices to be issued upon the minor defendants and their guardian. I think it is a reasonable inference under the circumstances that Badan Mani was the guardian appointed by the Court of these minors.

But then, another objection is taken. It is said that if Badan Mani was in fact appointed she ought not to have been so appointed because Sadanund the certificated guardian of the minors Gobinda and Gujiram had a preferential claim under the Civil Procedure Code.

It may be that the Court exercising the powers it had under the code may have preferred to give the guardianship to Badan Mani rather than to Sadanund. But even if it be assumed that

this was not done and that the Court acted in contravention of the provisions of section 443, Civil Procedure Code, on overlooking the claims of the certificated guardian, then the question arises whether the omission was anything more than an irregularity. It has been so held to be an irregularity in a recent decision in *Dammar Singh v. Rirbhu Singh* (1) and I see no reason to dissent from it. I may also mention in this connection that Sadanund who was the certificated guardian was a party to this suit and took an active part in the compromise. The conclusion at which I therefore come is that the minors were represented in the suit in which the compromise decree was passed.

Then, it has been objected that there is nothing to show that the Court considered whether or not the decree was for the benefit of the minors.

Here again, there is no order which states in so many terms that the Court has considered the matter and found that the compromise was for the benefit of the minors; but we find that on the 8th August 1899 an order was recorded under which permission was given to compromise the case for the minor defendants. I think it must be assumed, in the absence of any evidence to the contrary, that the Court did its duty in the matter and was satisfied, before giving permission, that the compromise was for the benefit of the minors concerned.

Then it has been urged that assuming that the minors were represented, it is not open to them now to go into the questions of fraud inasmuch as an issue as to the alleged fraudulent character of the compromise was raised and decided in the rent decree of the 8th September 1902; on the other hand it has been contended that this decree does not constitute *res judicata*, that the point was not raised in either of the lower Courts. It is also suggested that in that suit also the minors were not properly represented.

The point does not appear to have been considered and therefore the case must be remanded to the lower appellate Court for the determination of the fifth issue whether the sole-nama in question is fraudulent and liable to be set aside. In determining this question of fraud, the Court will consider whether or not the judgment and decree in the rent suit of 1892 constitute *res judicata* on the question of fraud alleged and will also inquire into, and if necessary take evidence upon, the question whether the minors were properly represented in the

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(1) (1907) I. L. R. 29 All. 290.

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rent suit of 1902. For unless they were represented the decision cannot constitute *res judicata* against them.

I think that as almost the whole of the argument in this appeal was directed towards the discussion of the point which has been decided adversely to the respondent, the latter ought to pay half the cost of the appeal to the appellant and the other half will abide the result of the suit.

N. K. B.

Case remanded.

Before Mr. Justice Rampini and Mr. Justice Woodroffe.

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May, 14,

PANDIT RAKAL CHANDRA TEWARI

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

The Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), Secs. 9, 22(2)—Transfer of appeal to Additional District Judge—Transfer of Property Act (IV of 1882), Sec. 106—Notice to quit—Validity—Tenancy at will or from month to month—Civil Procedure Code (Act XIV of 1882), Sec. 51—Signature and verification of plaint.

Under sections 9 and 22(2) of Act XII of 1877, the District Judge has jurisdiction to transfer to the Additional District Judge any suit or appeal transferred by him originally to a Subordinate Judge and then withdrawn.

Bidya Moyee v. Surja Kanta (1) distinguished.

A plaint signed by the Collector and a pleader, who is not the Government pleader but who generally acts for Government, but verified by the Collector and the Government pleader, is properly signed and verified on behalf of the Secretary of State, even though it was signed and presented at a Sub-division, where the Government pleader does not ordinarily practise.

Per Rampini J.—In the absence of any evidence as to the commencement of a tenancy or its character, it is to be presumed that the tenancy was a monthly tenancy expiring with the last day of the Bengali month of each year. A notice to quit, therefore, served on the 8th August 1899 requiring the tenant to quit on the last day of Chaitra 1306 (12th April 1900) was quite valid.

Appeal by the defendant.

Suit for ejectment.

The facts and arguments appear from the judgment of Rampini J.

Babu Nanda Lal Sarkar for the Appellant.

Babu's Ram Charan Mitra and Shish Chandra Chowdhury for the Respondent.

* Appeal from Appellate Decree No. 2407 of 1904 against the decision of A. E. Harward Esq. Additional District Judge, 24-Pergunnahs, dated the 30th June 1904, reversing that of Babu Bepin Behari Chatterji, Munsiff, Alipor, dated the 30th September 1903.

(1) (1906) I. L. R. 32 Calc. 875.

The following judgments were delivered by

Rampini J.—This appeal arises out of a suit brought for ejectment of the defendant from 2 plots of land, after notice to quit; and there is a prayer for rent up to the date of the giving of the notice and for damages after that date.

The case has been tried by the Additional District Judge of the Twenty-four Parganas, who has decreed the plaintiffs' suit.

The defendant appeals to us; and on his behalf it is contended: *first*, that the Additional District Judge had no jurisdiction to try the case, because the District Judge had no jurisdiction to transfer the case to him for trial: *secondly*, that the notices to quit are invalid: *thirdly*, that the plaint was not properly verified, so that the suit was not legally instituted: *fourthly*, that both the plots in dispute are plots of agricultural land: *fifthly*, that the petitions (Exhibits 1 and 2) have not been properly construed by the Additional District Judge: *sixthly*, that the Court had no jurisdiction to ascertain fair and equitable rents: and *seventhly*, that there has been misjoinder of parties.

I need say nothing as to the last ground of appeal, because the learned pleader for the appellant has not pressed it, but has apparently abandoned it.

As regards the first ground, namely, that the Additional District Judge had no jurisdiction to try the case, I find that the case was transferred to him for disposal on the 6th February, 1904. The appeal had originally been preferred to the District Judge who transferred it to the file of the Subordinate Judge. Then it was retransferred to the file of the District Judge, who made it over for disposal to the Additional District Judge on the date already mentioned. The pleader for the appellant contended on the authority of the case of *Bidya Moyee Debya Chowdhurani v. Surja Kanta Acharji* (1), that the District Judge had no jurisdiction to transfer to the Additional District Judge any particular case pending before himself. He says that, under section 8 of Act XII of 1887, the District Judge had power only to assign certain functions to the Additional District Judge, that is to say, that he could transfer to him particular classes of cases, but could not transfer to him any particular case for decision. I am unable to accede to this view of the matter. It would appear to me that the District Judge can assign any function to the Additional District Judge in one case, as in many, or in any particular class of cases; and it would also appear to me that the

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learned Judges who decided the case of *Bidya Moyee v. Surja Kanta* (1), did not decide the question as to whether a District Judge can transfer to an Additional District Judge any case. All that they said was that it was extremely doubtful whether it was right to do so. However, that observation would appear to me to be merely an *obiter dictum*, because what the Judges in that case had to decide, and did decide was whether the District Judge, having tried an appeal and heard all the arguments and merely reserved Judgment, was, or was not justified in transferring such a case to the Additional District Judge for disposal, and they decided that he was not. But, however this may be, it seems to me that the matter is settled by the provisions of section 9 and section 22, sub section 2, of Act XII of 1887. In section 9 of Act XII of 1887 it is said, that "subject to the superintendence of the High Court, the District Judge shall have administrative control over all the Civil Courts under this Act within the local limits of his jurisdiction."

Now, it is clear that the Court of the Additional District Judge is a Civil Court within the local limits of the District Judge. Then, 'under sub-section 2 of section 22, it is said that the District Judge may withdraw any appeal so transferred, (that is, so transferred, to the Subordinate Judge) and either hear it himself or transfer it to a Court under his administrative control for disposal. Now, that was exactly what was done in this case. The appeal was first transferred to the Subordinate Judge, then withdrawn by the District Judge from the file of the Subordinate Judge and, finally made over to the Additional District Judge for disposal; and the Additional District Judge's Court is a Court under the District Judge's administrative control competent to dispose of such an appeal. There was, therefore, no want of jurisdiction on the part of the Additional District Judge in this case.

The next ground of appeal is that the notices were invalid. Now, the notices to quit in this case were dated 25th July 1899. They were served on the defendant on the 8th August 1899; and they desired the defendant to quit on the last day of the month of Choit 1306 (12th April 1900). The lands in dispute in this case have been held to be non-agricultural lands, to which the provisions of the Transfer of Property Act apply. They are, therefore, not lands let for agricultural or manufacturing purposes and they accordingly come under the provisions of section 106

and are lands held on leases from month to month, which are terminable on the part either of the lessor or the lessee by 15 days notice, expiring with the end of a month of the tenancy. Now the notices given in this case exceeded eight months: whereas 15 days notice only was required. The pleader for the appellant contends that the notices did not expire with the end of the month of the tenancy. But he cannot tell us what the period of the tenancy was and when it began and when it ended. He contends that the lease of one plot began on the 14th June 1892 and that of the other on the 6th February 1892, because he points out that these were the dates on which the defendant applied for the leases of these lands. But it does not follow that, because the defendant applied for leases of these lands on these particular dates, the leases were granted on the said dates. On the contrary, it would seem to me more probable that they were granted on later dates. But, however, that may be, it is quite uncertain in this case what were the dates from which the tenancies ran. Neither of the Courts have determined this question, and the appellant's pleader says he cannot give any definite information on this point. Therefore, it seems to me that the presumption is that the tenancies were monthly tenancies, expiring with the last day of each month of the Bengali year and consequently that the notices were valid and sufficient. The last objection to the notices was that they were signed by the Collector and not by the Secretary of State. But it appears to me that it was unnecessary that the Secretary of State should sign them and that they should expressly state that they were given on his behalf. The Collector is the representative of the Government and the notices were given on behalf of the Government, which would seem to me to be sufficient.

The next ground of appeal is that the plaint was not properly signed and verified. But the plaint was signed by the Collector and a pleader, who is not the Government pleader, and the verification was signed by the Collector and the Government pleader. The Government pleader, of course, practises at the head quarters station of Alipore, whereas this suit was instituted at Diamond Harbour. And the Munsiff has pointed out that the plaint was filed by the pleader who generally acts for the Government in the Civil Courts at Diamond Harbour. It therefore appears to me that the plaint was properly presented and that there is no ground to hold that the contrary was the case. In any case, this is a matter which does not go to the root of the case. There

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is not the slightest doubt that the case was instituted by the Government and carried on by the Government; and if there has been any irregularity in the filing of the plaint, that would be covered by section 578, Civil Procedure Code.

The next ground is that both the plots in dispute are plots of agricultural and not of residential land, as found by the Court of appeal below. I need only say that the finding of the Additional District Judge on this question is a finding of fact with which I cannot interfere in second appeal. But I would add that I do not see any ground to suppose that the Judge has come to a wrong finding on this point. So far as I can judge of the nature of the plots of land from the proceedings of both the lower Courts, they are plots of non-agricultural land to which the Transfer of Property Act applies.

Then, the pleader for the appellant contends that the petitions (Exhibits 1 and 2) have not been properly construed by the lower appellate Court. These petitions were presented by the defendant for settlement of the land. I understand he denies having presented them. But it is proved by the evidence adduced by the plaintiff that he did so. In both these petitions he speaks of the land as homestead land; and the Additional District Judge, it seems to me has not misconstrued the petitions in any way, when he finds on the strength of one of them that the land is homestead and on the strength of the other that the defendant is an under-tenant.

The last ground urged is that the lower appellate Court had no jurisdiction to ascertain fair and equitable rents. This applies to the last portion of the Additional District Judge's judgment, in which he gives the plaintiff a decree for rent up to the date of the determination of the defendant's tenancy, with cesses and damages from after that date. There has been a dispute between the parties as to what the rent payable by the defendant should be. It appears that when the Government let the land to the defendant there was no express stipulation as to the rent payable by him. The defendant with regard to one plot (No. 2) expressly agreed to pay the rent fixed on it by the Deputy Collector. Now, the Deputy Collector has fixed the rate of rent for that plot at Rs 8-15 annas. That would seem to me to be a perfectly fair and equitable rate; and the defendant would appear to be bound by his own stipulation to agree to it. Then, the rent of the other plot has been fixed at Rs. 11-10 annas,

which is below what the plaintiff claimed ; and it has been found by the Munsiff to be a fair and proper rent.

For these reasons I would dismiss this appeal with costs.

Woodroffe J.—I agree with my learned brother's findings as to the 4th, 5th and 6th issues argued in this appeal. I think also, as regards the first issue, that the District Judge had power to transfer the appeal to the Additional District Judge.

But as regards the 2nd and 3rd issues raised on the hearing of this appeal, relating to the notices and to the alleged defects in the signing and verifying of the plaint, I think it sufficient to say that the finding of the lower appellate Court is that the tenancy of the defendant was a tenancy at will ; and that as to the defects, if any, in the signing and verification of the plaint, that is a matter which is cured by section 578, Civil Procedure Code.

On these grounds I agree that this appeal should be dismissed with costs.

N. K. B.

Appeal dismissed.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

GAJENDRA SAHU AND OTHERS

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

Land Acquisition Act (I of 1895).—Declaration—Land actually acquired not mentioned—Reference to Civil Court.

When land actually taken up by Government is different from that mentioned in the declaration issued under the Land Acquisition Act, the proceedings of the Collector are void and there can be no valid reference to the Civil Court.

Appeal by the Claimants.

Reference under Sec. 18 of the Land Acquisition Act.

The facts appear from the judgment.

Babū Jogesh Chunder Dey for the Appellants.

Babus Ram Charan Mitra and Krishna Prasad Sarbadhikari for the Respondent.

The following judgment was delivered by

Rampini J.—This is an appeal against a decision of the Munsiff of Puri, dated the 18th June 1906.

The appeal arises out of a Reference under section 18 of the Land Acquisition Act. It appears that the Government has taken up certain land in the vicinity of the Jugganath temple

* Appeal from Original Decree No 414 of 1906, against the decision of Babu Banwari Lal Banerji, Munsiff, Puri, dated the 18th June 1906.

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at Puri, for the purposes of a rest-house called the Dooly Chand rest-house. The parties could not agree as to the compensation ; and they did not accept the award of the Collector. The Deputy-Collector has therefore, referred the case to the Land Acquisition Judge. There was also a dispute between the parties as to the boundaries of the land. The Munsiff says * * " the area found by the Commissioner appointed to measure the land is, '072, i. e., less than 0'110, and for the boundary, there is a mistake : but no party was misled by this mistake, as the plot numbers were mentioned." It appears, however, on referring to the plan, and to the declaration published at page 20, Part IB of the *Calcutta Gazette* of the 25th January 1905, that the land to be acquired lies immediately to the south of the land which has actually been acquired under the Land Acquisition Act. According to the declaration the land to be acquired is bounded on the north by the buildings of Padhiary Nijoya. But, on reference to the plan, we find that the land acquired, lies immediately to the north, and not to the south of the buildings of Padhiary Nijoya. Therefore it seems to us and this is admitted by the senior Government pleader that the land actually acquired lies outside the boundaries of the land for the acquisition of which the declaration was issued. In these circumstances the proceedings in the present case are entirely invalid and without jurisdiction. The reference by the Deputy Collector is wrong and the proceedings of the Land Acquisition Judge are wrong.

On this ground we must decree this appeal. We accordingly set aside the proceedings of the Deputy Collector and of the Land Acquisition Judge. The appellants are entitled to all the costs incurred by them in all the Courts. The hearing fee in this Court is assessed at five gold mohurs.

N. K. B.

Appeal decreed.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice and
Mr. Justice Doss.

JOTINDRA MOHAN SEN AND OTHERS

v.

UMA NATH GUHA AND ANOTHER.

Land revenue, realisation of—Indian Contract Act (IX of 1872)
Sections 59 and 60.

Sections 59 and 60 of the Indian Contract Act apply to transactions in
relation to realisation of land revenue.

Ganga Bishun Singh v. Mahomed Jan (1) not followed.†

Appeals by the Plaintiffs.

Suit to set aside revenue sale.

The material facts and argument appear from the judgment.

Dr. Rash Behari Ghose and Babu Mohini Mohan Chuckerbutty
for Appellants in appeal No. 1393.

Babus Jogesh Chunder Roy, Ratan Chand Boral and
Surendra Nath Guha for the Appellants in appeal No. 1683.

Babu Nil Madhub Bose and Dr. Priya Nath Sen for Res-
pondents.

The judgment of the Court is as follows :—

Maclean, C. J.—The only question in this case is whether
there were any arrears of revenue due, which would justify the
sale which has taken place. This is a second appeal, and we
must accept the facts as found by the lower appellate Court.
The difficulty arose as to the non-payment of the January kist
for the year 1899 :—the last day for the payment of that kist was
the 12th of January and it was not paid. But on the 27th of
February 1899, a notification was issued from the office of the
Collector in these terms : "It is hereby notified under sections 5
and 13 of Act XI of 1859 that if arrears of revenue mentioned
below be not paid on or before the 28th of March, i.e. the next
latest day, for payment of revenue, the undermentioned Mehals
or share or shares thereof lying within District Faridpur shall
be sold by auction for the said arrears in the office of the Collector
of the said District at 11 A. M. of the next sale day." The Judge
in the Court below finds that that notification was issued—the

* Appeals from Appellate Decrees Nos. 1393 and 1683 of 1906, against the
order of W. S. Countts Esq., District Judge of Faridpur, dated the 18th June
1906, affirming that of Babu Kalidhan Chatterjee, Additional Subordinate
Judge of that district, dated the 14th June 1901.

(1) (1906) I. L. B. 33 Cal. 1193 at 1198.

† [See *Roehmney Bullaß Roy v. Mulk Jamnia Begum* (1893) I. L. B. 9
Cal. 914 at 917—Rep].

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arrear was a very petty sum of Rs. 1-6-11 p—some two or three days before the 28th of March. The present appellants, the plaintiffs who are seeking to set aside the sale, remitted a sum of Rs. 3-7as. to the Collector, and the Collector received it on the 28th March. He appropriated that sum of Rs. 3-7as. to the payment of the March kist, the last day for the payment of which was also the 28th March, and not to the payment of the small arrear of the January kist. The question turns upon whether this payment of Rs. 3-7as. ought to have been appropriated to the January kist which was in arrear or to the March kist; if to the former, there would have been no arrear to justify the sale. The plaintiffs when remitting the money did not expressly intimate that the payment was to be applied to the discharge of the January kist. Then the question arises whether the circumstances imply that the payment was to be applied to the discharge of the arrears of the January kist. I think the circumstances raise such implication. The fact of the above notice having been sent and having been received telling the plaintiffs that, unless they pay the arrears on or before the 28th of March the property would be sold, the fact that they paid it so that it was received on that day, and with the object of its being received on that day, implies that the plaintiffs intended the payment to be treated as made in respect of the January kist. No intimation or notice had been given to them about the March kist. The March kist amounted to about Rs. 9, so that the amount sent was substantially below the amount of that kist and was a little in excess of the small arrears of the January kist. The probabilities appear to be greatly in favour of the view that the payment was made in respect of the January kist and it ought to be treated as paid in respect of that kist. In that view, the money was in the coffer of the Collector on the 28th March, the last day for payment; and there was consequently no default which would warrant a sale.

We have been referred to a case of *Ganga Bishun Singh v. Mahomed Fan* (1), where it was held that sections 59 and 60 of the Indian Contract Act do not apply to transactions in relation to realization of land-revenue. Speaking with great respect, I am doubtful as to the soundness of that decision. If these sections do not apply, what law does apply? There is nothing specific on the subject in Act XI of 1859. If sections 59 and 60 of the Contract Act do not apply, we must fall back upon

the general law and practically that law is embodied in these sections.

For these reasons, I think the appeal must succeed and the sale must be set aside.

- The plaintiffs are entitled to their costs in all the Courts.

This judgment, it is conceded, will govern appeal No. 1683 of 1906, which is accordingly allowed with costs in all the Courts.

Doss J.—I agree.

A. T. M.

Appeal allowed.

CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Gupta.

MOHUNT GOBINDA RAMANUJ DAS

v.

LAKHUN PARIDA.*

High Court, power of—Act X of 1850, Sec. 153—Civil Procedure Code (Act XIV of 1882), Sec. 622—Charter Act (24 and 25 Vict. C. 104), Sec. 15—Revision where appeal lies.

The High Court has power, notwithstanding section 153 of Act X of 1850, to revise the orders of lower Courts where they have not acted correctly according to law under section 622 of the Civil Procedure Code or under section 15 of the Charter Act.

Where the application is not merely to set aside the order of a Deputy Collector, but also the appellate order of a Collector, the Court can properly interfere under section 622 Civil Procedure Code

Ram Kristo Roy v. Naik Tara Das (1) distinguished.

Rules obtained by the Plaintiff.

Suits for rent.

The necessary facts appear from the judgment.

Dr. Rash Behary Ghosh and Babu Provash Chandra Mitter for the Petitioner.

Babu Asutosh Mookerjee for the Opposite parties.

The judgment of the Court was delivered by

Brett J.—These rules have been issued in respect of 7 out of 13 analogous rent suits which were instituted in the Court of the Deputy Collector of Balasore. In these suits, it appears that the plaintiff claimed to recover arrears of rent from the

* Civil Rules Nos. 1797 to 1803 of 1906 against the decision of the Collector of Balasore.

(1) (1888) 12 C. L. R. 449.

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defendants partly in produce and partly in money and that the defendants in each case set up the plea that rent in money alone was payable by them, and they also in each case pleaded payment. The Court of first instance decided the question of the amount of rent payable in favour of the defendants and also found that to a certain extent the plea of payment had been substantiated in each case. Therefore, modified decrees have been given and against these modified decrees, the plaintiff appealed. As the amount sued for in six of the cases exceeded Rs. 100, appeals were preferred against the decisions in these cases to the District Judge. In the remaining seven, in respect of which these rules have been issued, the amount sued for did not exceed Rs. 100 in each case and therefore appeals were preferred to the Collector. The Collector without waiting for the decision by the superior Court of Appeal of the questions in issue which were analogous in all the thirteen cases, proceeded to dispose of the 7 appeals preferred to his Court and dismissed them all with costs. It is in respect of these 7 suits that the present application was made to this Court and the rules issued.

The rules were to the following effect, *vis.*, that the opposite party should show cause why the order of the Deputy Collector should not be set aside on the ground that he acted with material irregularity in refusing to postpone the case for the production of necessary evidence in his Court and why the judgment and order of the Collector confirming that order should not be set aside on the ground that, under the circumstances, other analogous cases being on appeal to the District Judge, he did not exercise his discretion correctly in deciding those cases without waiting for the decision of the higher Court of Appeal. The latter portion of the Rule ought more properly to precede the former as we have to deal first with the decree of the Appellate Court and then with the judgment and decree of the Court of First Instance.

It appears that subsequent to the issue of these rules by this Court, the six appeals to the District Judge of Cuttack have been heard and disposed of with the result that in each case, the District Judge has ordered the suit to be remanded to the Court of First Instance, the Deputy Collector, in order that he might admit the evidence which he had failed to admit and then proceed after giving both parties reasonable opportunities to prove their cases, to dispose of the cases according to law.

The learned pleader who appears in support of these rules

has suggested that similar orders should be passed with reference to these 7 suits. The learned pleader who appears to oppose the Rules has in the first instance contended that, under the provisions of section 153 of Act X of 1859, this Court has no jurisdiction to revise the judgments and decrees of the Collector or of the Deputy Collector.

We do not think that contention can now be accepted as it has been frequently held in this Court that it has powers either under section 622, Civil Procedure Code, or if not, under section 15 of the Charter Act to interfere in cases where the Lower Courts have not acted correctly according to law.

It has also been contended that this Court cannot deal with the present cases under section 622, Civil Procedure Code, because the judgment and decree of the Deputy Collector were appealable to the Collector. The case of *Ram Kristo Roy v. Naik Tara Dass* (1), has been relied on.

In these cases however, rules have been issued with the object not merely of setting aside the order of the Deputy Collector but also of setting aside the appellate order of the Collector, and we do not think that that ruling has any bearing on the present cases.

It has lastly been suggested that on the merits the present Rules ought to be discharged. It is argued that the plaintiff ought to have produced the evidence, namely, the *Rubakari* of the Assistant Settlement Officer, that before the Deputy Collector they had full opportunity to do so, and that as they failed to produce it, they cannot now claim to have the judgments and decrees of the Collector and Deputy Collector set aside on the ground that adjournments ought to have been granted in order to enable them to produce that document.

The judgment of the learned District Judge, in the other six appeals which had been preferred to his Court, has been laid before us and the correctness of the facts set out in it have not been disputed. He points out that these 13 suits which were all analogous were pending before the Deputy Collector up to the 5th July 1905, and that the plaintiff had applied to the Deputy Collector to have the Settlement Officer's *Rubakari* produced and admitted as evidence in the case. That *Rubakari* was at the time filed in two other cases which were under appeal to the District Judge, and an application was made to the District Judge at that time for the production of the *Rubakari*. The Deputy

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Collector was, in reply, informed that it could not be returned until the appeals were disposed of. The Deputy Collector waited from the 5th July to the 13th of November and then apparently on some report which he saw of the District Judge's office he disposed of these cases on the 13th November. The two appeals in which the document had been filed were disposed of in the following January and it is not clear why, having waited for four months for the disposal of the appeals, the Deputy Collector could not have waited longer or could not have taken steps to ascertain from the District Judge, when these appeals were likely to be heard so that the document on which the plaintiff relied and which was filed in those suits might be produced as evidence in the cases then before him. The District Judge who has disposed of the appeals has had the document in question filed in his Court and after perusing that document has come to the conclusion that it ought to have been admitted in evidence in the Court of the Deputy Collector and that the suits should not have been disposed of by the Deputy Collector without considering that evidence. The contention advanced on behalf of the opposite party that the present petitioner failed to take proper steps to secure the production of the document before the Deputy Collector does not appear to be supported by the evidence. It appears that he took steps by an application made to the Court in which the suits were pending to have the document produced, but that he failed to secure its production. It is hardly reasonable to suppose that after the Court had failed to secure the production of the document the petitioner would have imagined that by an application under section 144, Civil Procedure Code, he would be more successful. In our opinion, the petitioner took all reasonable steps to secure the production of the document and certainly it was not his fault that it was not in evidence before the Deputy Collector when he disposed of the thirteen cases.

The learned Collector in disposing of the seven appeals in respect of which these Rules have been issued has not recorded a satisfactory judgment. He has merely stated the facts and has recorded his findings, but has not attempted to state what reason he had for arriving at these findings on the facts. In dealing with the document, the Collector merely remarks that the origin: *Rubakari* of the Settlement Officer not being forthcoming, under the circumstances it cannot be relied upon. It is impossible to understand what he meant by the concluding portion of his

remark, as, if the document was not produced before him, it is hard to understand how he could arrive at any conclusion whether it was entitled to any reliance or not. In our opinion the Collector in disposing of the 7 appeals while the six other appeals in the analogous suits were pending in the Court of the District Judge, which was a higher Court of Appeal, did not exercise his discretion wisely and we think that his decision in itself is open to adverse criticism and that the appeals should not have been disposed of by him without securing the production of the important document on which the plaintiff relied. We further agree with the finding of the District Judge in the analogous appeals that the Deputy Collector ought not to have disposed of the 7 suits now under consideration before us without having secured the production of the *Rubakari* on which the plaintiff relied.

We, therefore, set aside the judgments and decrees of the Collector and Deputy Collector in these 7 suits and we direct that the 7 suits be sent back to the Deputy Collector for rehearing. Reasonable opportunity will be given to the plaintiff to produce in evidence and prove the document on which he relies; both parties will be allowed full opportunity to prove their respective cases; and the Deputy Collector after taking the evidence and duly considering it, will proceed to dispose of the seven suits according to law.

Costs will abide the result.

We assess the hearing fee in this Court at Rs. 140 (Rupees one hundred and forty), that is Rs. 20 (Twenty) in each Rule.

N. K. B.

Rules made absolute.

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PRIVY COUNCIL.

PRESENT :—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble,
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RADHA PROSAD MULLIK AND ANOTHER

v.

RANIMONI DASSI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.]

Hindu Law—Will—Construction, considerations for—Gift to daughters "and their respective sons"—Share of a daughter dying "without leaving any male issue surviving" to go to the surviving daughter and her sons—Share of a daughter dying leaving sons to go to her son or sons—Intention of the testator, exclusion of daughters' daughters—Nature of estate taken by each daughter—Indian Succession Act (X of 1865) Sec. 82.

In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate.

Mahomed Shumsool v. Shewukram (1), approved and followed.

Where the only question raised upon the appeal was as to the nature of the estate which, in the events which had happened, the testator's daughters took under the clause of the will of a Hindu inhabitant of Calcutta *viz.*, "I desire and direct my executors to make and divide the whole of my estate, both real and personal, unto and between my daughters in equal shares, to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving but leaving my other daughter her surviving then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons share and share alike."

Held, that the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons, and that, in the events that had happened, the daughters of the testator were entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves.

Held also, that by the gift to his daughters "and their respective sons," and by the proviso that in the event of one of the daughters dying "without leaving any male issue surviving" the share of the deceased daughter was to go to the surviving daughter and her sons, to the exclusion in both cases of

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female issue, the testator had clearly succeeded in showing that his daughters, whom he incontestably intended to benefit, were not to have more than what was generally known to be a woman's estate in his property; and that no language could more clearly show than the language of the clause, "in the case of the death of either daughter leaving sons, the share of such daughter to be paid to such her son or sons share and share alike," that the intention of the testator was to exclude his daughters' daughters from the succession, to which they would have been entitled under the ordinary Hindu Law, if their mother's estate had been absolute.

With reference to the contention that under section 82 of the Indian Succession Act (X of 1865) the daughters took an absolute estate;

Held, that, under the terms of the will, only a restricted interest was intended to pass to a daughter dying without male issue.

Appeal from a decree of the Appellate side of the above-mentioned High Court (1) modifying a decree of Woodroffe, J., sitting on the original side of the said High Court (July 31, 1905) (2).

The principal questions raised on the appeal were questions of law relating to the construction of the Will of one Hurry Dass Dutt, who died on October 30, 1875. The testator executed the will on the day of his death and thereby appointed three executors and trustees, *viz*: (1) Srimutty Surnomoni Dassi, his widow; (2) Modhusudan Dutta, his father; and (3) Dwarka Nath Dutt, his uncle. The following is the material part of the Will:—

"Whereas having no son born to me of my body I am desirous of adopting one in my life-time but in case I depart this life before carrying such my desire into effect, I hereby authorize and empower my wife and executrix Srimutty Surnomoni Dassi and my executors and trustees to whom I give full permission and liberty to adopt after my decease a son and in case of his death during his minority or on attaining his full age and without leaving male issue to adopt a second son and in case of his death during minority or on attaining such age and without leaving male issue to adopt a third son and no more. In any of the above cases of adoption should the adopted son die leaving a son or sons the power of adoption shall cease or remain in abeyance during the life or lives time of such son or sons of such adopted son but shall revive on the death of such son or sons during minority.

"I direct my executors and executrix and trustees to pay out of the income and interest of my Estate and Effects monthly all

(1) (1906) 1 L. R. 33 Calc. 951; 3 C. L. J. 502; 10 C. W. N. 695

(2) (1906) 1 L. R. 33 Calc. 247; 9 C. W. N. 1033.

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necessary household expenses as well as for the worship of our family Idol Sri Sri Radha Gobindji and to pay my wife monthly during her natural life for her sole and separate use the sum of rupees two hundred and also the sum of rupees fifty monthly to such adopted son who shall live and attain his full age of 18 years after his so attaining such age of 18 years during the life-time of my said wife provided he remains under her control and bears a good character, and if my said executrix and executors and trustees think fit and are satisfied with his conduct and behaviour and for the purposes of such monthly expenditure my executrix, executors and trustees shall set apart and retain out of the interest and income of my estate a sum sufficient to meet such expenditure for six months and invest the rest and residue of such income and interest in Government Securities in their joint names but in no case shall such adopted son have or exercise any control, dominion over my Estate and Effects until the death of my wife, after which event I direct my said executors and trustees to make over the whole of my Estate and Effects both real and personal or immovable or moveable whatsoever and wheresoever and of what nature or quality soever to such adopted son who shall survive my wife if he shall have attained his age of 18 years during the life-time of my wife or on his so attaining such age after her decease to whom and his heirs I give, devise and bequeath the same. But in case none of such adopted sons survive my said wife or in case of either surviving my said wife and dying under the said age without leaving a son or sons I desire and direct my executors after the death of my said wife or the death of such son after her but under such age of 18 years without leaving a son or sons to make over and divide the whole of my Estate, both real and personal unto and between my daughters in equal shares to whom and their respective sons I give, devise and bequeath the same but should either of my said daughters die without leaving any male issue surviving but leaving my other daughter her surviving then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter or in case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike."

Hurry Dass Dutt left him surviving the following persons, viz: (1) his widow Srimutty Surnomoni Dassi; (2) his daughter Srimutty Ranimoni Dassi; (3) his daughter Srimutty Premmoni

Dassi; and (4) three sons of Premmoni Dassi, viz.—(a) Radha Prosad Mullick, (b) Kasi Prosad Mullick and (c) Jyoti Prosad Mullick.

On December 20, 1875 probate of the will was granted to the widow and uncle of the deceased, two of the executors named.

On August 9, 1876 Srimutty Surnomoni adopted Jyoti Prosad Mullick, as a son, but Jyoti Prosad Mullick died on January 9, 1881, unmarried. Thereafter on February 9, 1881 she adopted one Amrita Lall Dutt. Modhusudan Dutt died on April 1, 1872, before the date of the latter adoption.

On August 14, 1894 Amrita Lall Dutt instituted a suit against the widow, her daughters and their sons for the construction of the will of Hurry Dass Dutt and for the administration of his estate. That suit, though successful in the first Court, [*Amrita Lall Dutt v. Surnomoye Dassee* (1)], failed on appeal, [*Amrita Lall Dutt v. Surnomoni Dasi* (2)], and also on a further appeal to the Judicial Committee of the Privy Council, [*Amrita Lall Dutt v. Surnomoye Dasi*, (3)], as the adoption by Srimutty Surnomoni was held to be invalid, the power of adoption conferred by the will on her and the executors and trustees having been declared invalid under Hindu Law and incapable of being exercised. The decision of the Privy Council was pronounced on May 2, 1900 and on November 2, 1900, Ranimoni, who was until then childless, and her husband, Ramakant Sen, adopted one Jugal Kishore Sen as their son.

Dwarkanath Dutt died on November 23, 1889 and Ramakant Sen predeceased Surnomoni who died on August 14, 1904. She held and managed the estate of her deceased husband and left a will dated January 31, 1903, by which she purported to deal with portions of the property covered by the present suit. The Administrator-General of Bengal, the executor named in her will, was in possession of those portions, having taken out probate of the will, but he was not a party to the present suit.

On December 19, 1904 the present suit was instituted on the original side of the High Court by Srimutty Ranimoni Dassi, one of the daughters of Hurry Dass Dutt, as plaintiff. The defendants were Srimutty Premmoni Dassi, the other daughter of Hurry Dass Dutt, her four sons, Radha Prosad Mullick, Kasi Prosad Mullick, Peary Lal Mullick and Behary Lal Mullick (the

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(1) (1897) I. L. R. 24 Calc. 589.

(2) (1898) I. L. R. 25 Calc. 562.

(3) (1900) I. L. R. 27 I. A. 128; I. L. R. 27 Calc. 999.

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Two latter of whom were born after Hurry Dass Dutt's death), and Jugal Kishore Sen. The Plaintiff contended that under the Will of Hurry Dass Dutt in the events that had occurred she and her sister were each entitled absolutely to a moiety in their father's estate. The reliefs sought were the administration and partition of the estate, with various reliefs, incidental thereto, but the principal relief claimed was a declaration of the rights of all parties to the suit on the true construction of the said Will.

The written statement filed on behalf of Peary Lal Mullick and Behary Lal Mullick challenged the validity of the adoption of Jugal Kishore Sen, and contended that in the events which had happened Hurry Dass Dutt had died intestate as to the residue of his estate to which their mother succeeded in preference to her sister.

A written statement of exactly the same nature was filed by Srimutty Premmoni Dass.

Radha Prosad Mullick and Kasi Prosad Mullick by their written statement claimed that they were absolutely entitled to the whole estate subject to the life interest of Hurry Dass Dutt's daughters.

The written statement of Jugal Kishore Sen supported the claim of the plaintiff.

The case was tried by Woodroffe, J., who delivered his judgment [*Radha Prosad Mullick v. Rane Mani Dassee and Peary Lal Mullick v. Rane Mani Dassee*, (1)] on July 31, 1905. He decided that on the true construction of the Will there was a gift to the adopted son with a valid gift over to the testator's daughters, and that there was no intestacy. He also held that each of the daughters took an absolute estate in her half share, and expressed no opinion as to the rights of the parties, in the event of the death of one of the daughters leaving no natural son ~~has~~ surviving. A decree was accordingly made declaring that the plaintiff was entitled absolutely to one-half share in her father's estate, directing an inquiry to ascertain of what the estate consisted of and ordering partition thereof.

Against that decree Radha Prosad Mullick and Kasi Prosad Mullick filed one appeal, and Peary Lal Mullick and Behary Lal Mullick another appeal, on the Appellate side of the High Court, and on April 23, 1906, the Court of Appeal delivered judgment. [*Radha Prosad Mullick v. Rane Mani Dassee and Peary Lal Mullick v. Rane Mani Dassee*, (1)]. It decided that under the

Will in this case the daughters each took a one-half share in their father's estate absolutely, and refused to decide what the rights of the parties would be in the event of one of the daughters dying without male issue. It further held that the inquiry ordered by the lower Court regarding the ascertainment of what the testator's estate consisted of could not properly be directed in the absence of the representatives of the testator or of Surnomoni Dassi. In the result the decree of the Court below was varied, the declaration of the plaintiff's rights was affirmed, and the inquiry as to the property and partition thereof were refused in the present suit.

Against that decree Radha Prosad Mullick and Kasi Prosad Mullick preferred the present Appeal to His Majesty in Council. Of the respondents only Ranimoni Dassi was represented at the hearing of the appeal.

Mr. DeGruyther, for the Appellants :—The construction of this will has already been once before this Board in the case of *Amrito Lal Dutt v. Surnomoye Dasi* (1), which decided that by this will a joint power to adopt was conferred on the executors of the will and was invalid in law, in consequence of which the son adopted in fact had no status in the family. The question for decision is whether each of the daughters took a life estate or an absolute estate. For the rules to be applied in determining the construction of the will of a Hindu, see *Mahomed Shumsool v. Shewukram* (2). In the absence of express words in a will showing such an intention a devise to a wife does not confer an estate of inheritance, but carries only a widow's estate as understood by Hindu Law, that is to say, a limited widow's estate : *Hirabi v. Lakshmibai* (3), *Annaji Dattatraya v. Chandrabai* (4), *Harilal v. Bai Rewa* (5), and *Mahomed Shumsool v. Shewakram* (2). In *Surajmou v. Rabi Nath Ojha* (6), where the testator used the word 'Malik' in making the devise to his wife and daughter-in-law, their Lordships held that the widow took an absolute estate. There the construction depended upon the meaning of that word "Malik," and in deciding that case for the meaning of that word the case of *Lalit Mohun Singh Roy v.*

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(1) (1900) L. R. 27 I. A. 123 ; I. L. R. 27 Calc. 996.

(2) (1874) L. R. 2 I. A. 7, at 10 and also at 13 ; 14 B. L. R. 226 ; 22 W. R. 409.

(3) (1886 & 1887) I. L. R. 11 Bom. 69 and 573.

(4) (1892) I. L. R. 17 Bom. 503.

(5) (1895) I. L. R. 21 Bom. 376, at 380 & 381.

(6) (1907) L. R. 35 F.A. 17 ; I. L. R. 30 All. 84 ; 7 C. L. J. 131.

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Chukhun Lal Roy (1), was referred to. But that case has left untouched the general principle that without express words in a Will a widow takes only a limited estate under it. A daughter's estate in Hindu Law is also limited. It is submitted that the testator here intended to give his daughters only limited estates and they took only estates for life.

Where the testator intends to give an absolute estate to his adopted son he uses the words to him "and his heirs." But in making a gift to his daughters in half a dozen lines further on he uses another expression, *viz.*, "their sons". That shows that he did not intend to give them absolute estates, otherwise he would have used the same expression.

The testator left him surviving a brother, a daughter, and another daughter and her two sons. For the rules of succession in a case like this, if the daughters take absolute estates, reference was made to Stokes' Hindu Law Books, Daya Bhaga, Ch. IV sections 2 and 3; and Mayne on Hindu Law and Usage (7th Ed.) p. 900, section 673.

There is a gift over of the share of the daughter dying without male issue to her surviving sister. Such a gift is inconsistent with an absolute gift to the daughters. If the testator gave an absolute estate to each of his daughters, there was no necessity of a gift over after the death of daughter without a male issue: Tagore case (2). Gift over is necessary only if there is a life estate given to the daughters.

Sir Robert Finlay K. C. and *Mr. Kenworthy Brown*, for the Respondent Ranimoni Dassi: Taking first the last part of the argument on the other side the testator provides "in case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike." It also is necessary to provide in case a daughter died without leaving son. Hence the clause. "But should either of my said daughters die without leaving any male issue surviving &c" The gift is dependent upon the happening of a specified uncertain event and the condition must be fulfilled before distribution. Section 2 of the Hindu Wills Act (XXI of 1870) makes section 111 of the Indian Succession Act (X of 1865) applicable to the Wills of Hindus. When section 111 of the Indian Succession Act is applied to this Will, the whole of it becomes consistent. The period of distribution is the testator's death and the daughters take absolute estates and the gifts over do not take effect: Indian

(1) (1897) L. R. 24 I. A. 76; I. L. R. 24 Calc. 884.

(2) (1872) L. R. I. A. Sup. 47; 9 B. L. R. 377; 18 W. R. 389.

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Succession Act section 111, illustrations (b) and (d) ; *Norendra Nath Sircar v. Kamalbasini Dasi* (1) ; *Lala Ramjewan Lal v. Dal Koer* (2) ; *Manikyamala Bose v. Nanda Kumar Bose* (3). It is not necessary to go to earlier law to find out the meaning of section 111, which must be construed without reference to earlier law : *Norendra Nath Sircar v. Kamalbasini Dasi* (4). "Surviving daughter and her sons shall be entitled to the share of the deceased daughter" means that the surviving daughter will take absolutely. Though under the Hindu Law a married daughter takes by inheritance a limited estate, she takes an absolute estate under a devise by Will, unless her interest is curtailed by express words or by necessary implication : Indian Succession Act, section 82 (made applicable to Hindu Wills by section 2 of the Hindu Wills Act) ; *Bhoba Tarini Debya v. Peary Lal Sanyal* (5), *Ramami v. Papayya* (6) ; *Atul Krishna Sircar v. Sanyasi Charn Sircar* (7). There is nothing here to curtail, either by express words or necessary implication, the daughter's interest, and the Court in such a case would construe that an estate of inheritance is given.

In *Hirabai v. Lakshmidas* (8) and also in *Harilal v. Bai Rewa* (9), the gift was from a husband to his wife. In *Annaji Dattatrya v. Chandrabai* (10), a son made a gift by deed to his mother for her maintenance. But here the gift is from a father to her daughters, who can take a gift of immovables from their father with power to alienate according to their pleasure : Stokes' Hindu Law Books, Daya Bhaga, Ch. IV, sections 1 and 23, p. 241. Property with unlimited power of alienation means absolute property.

Under the clause "to make over and divide the whole my estate both real and personal unto and between my daughters in equal shares to whom and their respective sons I give, devise and bequeath the same" it is contended by the other side that a gift is made first to the daughters, and then to their sons. But this sentence cannot be divided or cut down. Then again they say that "heirs" would have been used, if an absolute gift to the daughters were meant. But the words "and their respective sons" are words of limitation. There is nothing in the will to show that the sons are to take at or after any event. No period

(1) (1896) L. R. 23 I. A. 18 ; I. L. R. 23 Calc. 583.

(2) (1897) I. L. R. 24 Calc. 408.

(3) (1906) I. L. R. 23 Calc. 1906, at 1314 ; 4 C. I. J. 357.

(4) (1896) L. R. 23 I. A. 18, at 23.

(5) (1897) I. L. R. 24 Calc. 646, at 650.

(6) (1893) I. L. R. 16 Mad. 466.

(7) (1908) I. L. R. 32 Calc. 1051 ; 3 C. L. J. 50.

(8) (1886 & 1887) I. L. R. 11 Bom. 69 and 578.

(9) (1895) I. L. R. 21 Bom. 376.

(10) (1892) I. L. R. 17 Bom. 506.

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is fixed for the sons to take. The contention on the other side makes this will quite a new will. There is nothing to show that the testator intended that the sons are to take after the death of the daughters. "To whom and their respective sons" would give absolute estate. Reference was made to *Bhoobun Mohini Debya v. Hurrish Chunder Chowdhry* (1), *Ram Lal Mookerji v. Secretary of State for India* (2); *Basanta Kumari Debi v. Kamikshya Kumari Debi* (3); *Lewin v. Killey* (4); and *Tagore Case* (5).

Mr. De Gruyther, in reply, further referred to *Nagelutchmee Unmal v. Gopoo Nadarju Chetty* (6), and argued that in *Bhoobun Mohini Debya v. Hurrish Chunder Chowdhry* (1), and *Ramlal Mookerji v. Secretary of State for India* (2), where it was held that absolute estates were given to women, the words used were, as held over and over again, technical words, such as "children and grand children" and "generation to generation". But here such words are absent. In Bengal and Madras the daughter takes a qualified estate only: *Chotay Lall v. Chunno Lall* (7). In order to arrive at the true construction the will must be read without the Indian Succession Act. Section 82 of that Act says nothing one way or the other. If an estate for life is given to each of the daughters, the period of distribution would be at the death of the tenant for life; and in that case section 111 of the Indian Succession Act has no application. If on the other hand an estate of inheritance is given, there could be no period of distribution. The true construction is that each of the daughters took a life estate and the sons of the daughters living at the testator's death a vested remainder, with a result that the adopted son of the plaintiff and two sons of the other daughter born after the death of the testator would take nothing.

Mr. Brown, with their Lordships' permission referred to Mayne on Hinds Law and Usage, (7th. Ed.) p. 900 and Mac-naughten's Principles and Precedents on Hindu Law, p. 39.

The judgment of their Lordships was delivered by

May, 14.

Sir Andrew Scoble.—Hurry Dass Dutt, a Hindu inhabitant of Calcutta, died on the 30th October 1875, leaving a will which was admitted to probate by the High Court on the 20th December in the same year. The will was in the English language, and was probably drawn by an English solicitor, who is one of the attesting witnesses.

(1) (1898) L. R. 5 I. A. 188; L. L. R. 4 Calc. 23.

(2) (1881) L. R. 8 I. A. 46; L. L. R. 7 Calc. 304.

(3) (1906) L. R. 32 I. A. 181; 22 L. J. 238; I. L. R. 33 Calc. 28.

(4) (1888) L. R. 13 App. Ca. 783.

(5) (1872) L. R. 1. A. Sup. 47.

(6) (1856) 6 M. I. A. 309.

(7) (1878) L. R. 6 I. A. 15 at 31; L. L. R. 4 Calc. 744.

The only question raised upon this appeal is as to the nature of the estate which, in the events which have happened, the testator's daughters take under the terms of the will.

The clause of the will relating to the daughters is as follows :

But in case none of such adopted sons survive my said wife, or in case of either surviving my said wife and dying under the said age without leaving a son or sons, I desire and direct my executors, after the death of my said wife, or the death of such son after her, but under the age of eighteen years without leaving a son or sons, to make over and divide the whole of my estate, both real and personal, unto and between my daughters in equal shares, to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, but leaving my other daughter her surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike.

Woodroffe J, by whom the case was heard in the first instance, held that the intention of the testator was "to benefit the adopted son, and should the provisions (of the will) in this respect in any manner fail, then those who were of his own blood, viz., his daughters"; that the words "and their respective sons" are used as words of limitation and not of purchase; and that upon the true construction of the will, the daughters were "each entitled to a moiety of the estate of the testator absolutely." He expressed no opinion, however, as to the right of the parties in the event of the death of one of the daughters leaving no natural son her surviving. Upon appeal to the High Court his judgment, upon these points, was confirmed.

With great respect for the learned Judges in the Courts below, their Lordships are unable to concur with their decision. This is the will of a Hindu, and as observed by this Committee in the case of *Mahomed Shumsol v. Shewukram* (1), "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family and it

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may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." In spite of the assistance of his English solicitor, it appears to their Lordships that in this case the testator has clearly succeeded in showing that his daughters, whom he incontestably intended to benefit, were not to have more than what is generally known to be a woman's estate in his property. This is established by the gift to them "and their respective sons," and by the proviso that in the event of one of the daughters dying "without leaving any male issue surviving," then the share of the deceased daughter is to go to the surviving daughter and her sons, to the exclusion in both cases of female issue. Moreover, "in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons share and share alike." No language could more clearly show that the intention of the testator was to exclude his daughters' daughters from the succession, to which they would have been entitled under the ordinary Hindu law, if their mother's estate had been absolute; and the reason of this is obvious, as the sons of his daughters would be competent to offer funeral oblations to him, the strongest of all possible arguments to an orthodox Hindu.

The learned Counsel for the respondents strongly relied on section 82 of the Indian Succession Act, 1865, which provides that "where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him." As already pointed out, it is abundantly clear that, under the terms of the will, only a restricted interest was intended to pass to a daughter dying without male issue.

In the opinion of their Lordships, according to the true construction of the will, the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons, and the learned Judges of the High Court ought to have held that, in the events that have happened, the daughters of the testator, Ranimoni Dassi and Premmoni Dassi, are entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves. They will humbly advise His Majesty that this appeal ought to be allowed and the decree of the High Court varied in accordance with this judgment, and that in other respects the decree ought to be affirmed. Under the circumstances, the costs

of the appeal, taxed as between solicitor and client, must be paid out of the estate.

Messrs. Watkins and Lempriere : Solicitors for the Appellants.

Messrs. T. F. Wilson and Co. Solicitors for the Respondent

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Appeal allowed ; Decree varied.

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Sir Andrew Scoble.

APPELLATE CRIMINAL.

*Before Sir Francis W. Maclean, K. C. I. E., Chief Justice,
Mr. Justice Geidt, Mr. Justice Woodroffe and Mr. Justice Cox.*

DURGA CHARAN SANYAL

v.

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March, 11, 24.

April, 3, 10, 24

Sessions Trial—Change of Judge—Evidence recorded by one Judge and orders passed by another—Validity—Difference of Judge and Assessors—Retrial—Real question not validly tried—Transfer of case—Trial with aid of assessors and trial by jury—Balance of convenience.

Per curiam. A Sessions Judge cannot act on evidence recorded by his predecessor in office. On a change of the Judge a Sessions trial must commence *de novo*.

The judgment passed by a Sessions Judge on evidence partly recorded by his predecessor in office is illegal and must be set aside.

Per Maclean, C. J., and Geidt J.—Where a trial has been invalidated on legal grounds and the real question in the case has not been legally tried, a retrial ought to be held, unless it appears from the record that there is no evidence against the prisoner or that there is very little chance of a conviction. Mere disagreement between Judge and assessors is no sufficient reason for refusing a retrial.

Per Woodroffe J. (contra).—The fact that the law gives operation to the finding of the Judge and not to that of the assessors does not detract from the value of the opinion expressed by them. Where, therefore, the Judge and assessors have disagreed as to the facts, which were peculiar and as to which different conclusions have been arrived at by different minds, there ought to be no retrial ordered.

Per Woodroffe and Cox, JJ.—In transferring a case, no consideration should be had to the fact that by a transfer to a particular district, the accused will have the benefit of a trial by jury, where previously he had none. The real question is that of convenience of parties.

Appeal by the accused.

Conviction under section 324 of the Indian Penal Code.

* Criminal Appeal No. 73 of 1908, against the decision of G. N. Roy, Esq., Offg. Sessions Judge of Bogra, dated the 9th January 1908.

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The facts of the case were as follows :

The accused Babu Durga Charan Sanyal, an old pleader, was charged by Messrs. Smart and Coates, two officers of the Eastern Bengal State Railway with having assaulted them with a *kukri* in a first class compartment of the down Darjeeling Mail Train on the night of the 23rd September 1907. The accused, on the other hand, alleged that he had got into the carriage by mistake and notwithstanding his explanations had been assaulted by the two persons above-named who had fisted and kicked him and threatened to throw him out of the moving train, that he had found a *kukri* in the compartment and he used it in self-defence.

The trial was held before Mr S. N. Huda and two assessors, in the Sessions Court of Bogra. After the close of the case for the prosecution, Mr. Huda fell ill and was succeeded as Sessions Judge by Mr. G. N. Roy. Mr. Roy proceeded with the trial from the point at which Mr. Huda had left and disagreeing with both the assessors found the accused guilty and sentenced him to two years' rigorous imprisonment. Hence this appeal.

The appeal came on for hearing before Geidt and Woodroffe JJ., on the 11th March 1908.

Mr A. Chaudhuri and *Babu Narendra Kumar Basu* for the Appellant.

Mr. W. Gregory for the Crown.

(C. A. V.)

On the 24th March 1908, their Lordships passed the following judgments :—

Geidt J.—The Sessions Judge of Bogra disagreeing with both the assessors has found the appellant guilty of causing hurt with a dangerous weapon and has sentenced him to two years' rigorous imprisonment.

The judgment was delivered by Mr. G. N. Roy. He had not heard the evidence for the prosecution and the circumstances in which this took place are set forth in the following paragraph of his judgment.

"The case was taken up by my predecessor Mr. Huda before whom the prosecution witnesses were examined. The case was postponed on account of the absence of the Civil Surgeon of Dinajpur who had been cited as a witness for the defence. My predecessor then fell ill and went on leave. I was appointed in Mr. Huda's place and, on my arrival at Bogra, I took up the case. Mr. Gregory, the Counsel appearing for the prosecution, asked for a new trial while Babu Ambica Charan Mazumdar pleader for

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the accused, opposed the prayer on the ground that it was unnecessary. I was of opinion that a fresh trial was not required by express law and since the accused objected to a new trial I have proceeded with the trial from the point where my predecessor left it. The reasons for my action are set forth in the order sheet."

Counsel both for the appellant and for the Crown are agreed that the Sessions Judge was not competent to proceed with the trial from the point where his predecessor had left it and that the consent of the accused made no difference. We are clearly of opinion that Mr. Roy was wrong in acting on evidence recorded by his predecessor, and the matter does not require further discussion. The conviction and sentence must, therefore be set aside as being bad in law.

We have next to consider whether we should direct a new trial. Mr. Chaudhuri for the appellant invited us to consider the case on its merits after perusing the evidence, and to say that there was no ground for directing a new trial. I do not think that it would have been proper for us to accede to this suggestion. If we had adopted it and, after weighing the evidence had directed a new trial, the accused might have been seriously prejudiced. We ought, I think, to be careful to express no opinion on the merits, and to make no order from which such an opinion could even be implied. All we have to consider is whether the accused should be tried again.

We confined ourselves to hearing the evidence of Smart, the person to whom the appellant is alleged to have caused hurt, and the written statement put in by the appellant. Mr. Smart's story is that he was wantonly attacked by the appellant, armed with a *kukri*, with which was inflicted a serious injury. The appellant's case is that he used the *kukri* in self-defence when attacked by Smart and Coates. So far there has been no legal trial by which the question at issue in this case could be determined.

The course adopted by the Sessions Judge has resulted in a leplorable waste of time, and a prolongation of proceedings which, on many grounds, it would have been desirable to shorten as much as possible. This result is, however, in a large measure due to the attitude taken by the appellant's pleader. Had the accused not objected to a new trial the Sessions Judge would, I rather from his judgment have acceded to the application made on behalf of the Crown to begin the trial *de novo*. The offence charged is a serious one but owing to the action taken by the

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appellant there has been no proper trial for that offence. In my opinion the rule should be that in all serious cases where the first trial, owing to defect of jurisdiction or similar cause, is rendered abortive, a new trial should be ordered, unless it is quite clear, on the materials before the Court, that there is no chance of conviction. There is less reason for departure from that rule where the first trial, which proceeded at the instance of the accused, and in spite of objection taken by the crown, has resulted in a conviction. In my opinion the proper order for us to make in this case is to direct a new trial.

I understand that Mr. G. N. Roy who delivered judgment in this case is still at Bogra. It would not be desirable to have the case tried by him after the opinion he has expressed in his judgment before us. The offence is alleged to have been committed in a running train, and it was apparently at one time doubtful whether it was committed in the Dinajpur or Bogra districts. The appellant has lately settled in Dinajpur. The Civil Surgeon of Dinajpur is a material witness for the defence I understand, as it was owing to his absence that Mr. Huda was unable to proceed with the trial.

The most convenient place for trial for all parties would therefore be Dinajpur, and I would direct that the retrial be held at that place.

As, however, my learned brother does not agree with me that there should be a retrial, the appeal, with our opinions thereon, must under section 429 of the Code of Criminal Procedure be referred to another Judge. The papers will accordingly be laid before the Chief Justice for the appointment of such Judge.

Woodroffe J.—The rulings of this Court were brought to the attention of the Sessions Judge and I think he should have acted on them instead of expressing his dissent with the general principle there laid down. His omission to do so has rendered this lengthy trial futile. The accused has contributed to this result and therefore were it not for other circumstances and for the fact that the assessors and Judge have disagreed, I should have been disposed to order a new trial notwithstanding that the accused has already been put to the trouble and expense of lengthy proceedings which have been rendered useless by the defective procedure adopted. The Sessions Judge and the assessors have however disagreed. On the circumstances of the case, which are peculiar, different minds have felt themselves constrained to different conclusions. That the law gives opera-

tion to the finding of the Judge does not alter the fact that the opinions of the assessors, which are generally valuable, do not support him. This fact is under the circumstances in my opinion sufficient to leave the matter in such doubt as to render further prosecution undesirable. It has been suggested by learned Counsel for the prosecution that the act of the accused was due to the unbalanced state of his mind. If this be so it would rather appear to me to be a ground for not taking further action. It is then said that the accused must be retried because he has never been properly tried. This argument if sound would preclude the Court's discretion in every case. For no question of retrial can arise except where the conviction is set aside on the ground that no proper trial has been held. The trial here is admittedly illegal and the conviction and sentence must therefore be set aside. In my opinion however for the reasons stated the proceedings should now be brought to an end. I am therefore unable to agree with my learned brother as regards the order for a retrial which he proposes to make.

Consequent on this difference of opinion, the matter was placed before the learned Chief Justice, who sat to decide it as the third Judge under section 378 of the Criminal Procedure Code.

The matter was argued before him on the 3rd April 1908 when His Lordship reserved judgment. On the 10th April 1908, the following judgment was delivered :—

Maclean C. J.—The only question submitted, and with which I can properly deal is, whether or not there ought to be a re-trial in this case. Mr Justice Geidt thought that there ought, and Mr. Justice Woodroffe took an opposite view.

The accused has been found guilty of causing hurt with a dangerous weapon, and has been sentenced by the Sessions Judge of Bogra to two years' rigorous imprisonment. The assessors did not agree; and, both were in favour of acquitting the accused.

Both the learned Judges were agreed that the procedure before the Sessions Judge was wrong; and that the conviction and sentence must be set aside as being bad in law. The only question that remains is whether there should be a re-trial. This is a matter for the exercise of the judicial discretion of the Court. It is impossible to lay down any hard and fast rule as to how that discretion should be exercised. Each case must be decided upon its particular circumstances. The learned Judges have expressed no opinion upon the merits, and in this, if I may respectfully say

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so, they were perfectly right : for, if a new trial be directed, any such discussion might have seriously prejudiced the accused. I express no opinion upon the merits. The evidence of Mr. Smart to whom the appellant is alleged to have caused hurt, and the written statement of the appellant, have been read. But, as has been pointed out by Mr. Justice Geidt, the real issue in the case, whether Mr. Smart was attacked by the appellant and seriously injured, or whether, as the appellant says, he only acted in self-defence, has not yet been legally tried. Although the conviction by reason of the faulty procedure adopted by the Judge, must be held to be bad in law, the Judge did, on the evidence convict though the assessors disagreed. In such circumstances I think there ought to be a re-trial, unless it is reasonably clear that there is very little chance of a conviction. I am not disposed to accept the view that the mere disagreement between the Judge and the assessors is sufficient reason for refusing a re-trial. It would be highly unsatisfactory, in a serious case such as the present, to have matters as they now stand, that is to say, without any judicial decision in a properly conducted trial, upon the merits. The waste of time and money caused by the erroneous procedure of the Sessions Judge, to which result the accused's pleader would appear to have contributed by his attitude in the matter, is much to be deplored : but, on the best consideration I can give to the case, I agree with Mr. Justice Geidt that there must be a re-trial, as it is essential in the interest of justice that the matter should be judicially sifted and decided. The case, however, should be tried by another Judge ; and, I agree with Mr. Justice Geidt that Dinajpur is the most convenient place for the new trial, with liberty, however, to the accused who, through Mr. Chaudhury asks that the trial may take place at Alipore, to make an application to the Criminal Bench on this point, if he so desire. In the meantime the accused may be out on bail.

The question as to the venue of the trial was then argued before the Criminal Bench (Woodroffe and Cox JJ.) on the 23rd April 1908 and the following judgments were delivered :

• **Woodroffe J.**—The question which has been argued before us is as to where the retrial which has been directed, is to take place.

The trial which has proved abortive, was held before Mr. G. N. Roy, sessions Judge of Bogra and he is still sessions Judge there. Mr. Gregory who appears on behalf of the Crown very rightly admits that the case cannot be retried by him, having regard to the obvious fact that he has already formed his conclusions upon the case.

Therefore, the trial must be held before some other Judge and in some other District.

The question then is, to what District shall the case be transferred?

Mr. Chaudhury who appears on behalf of the accused asks that the case may be tried at Alipore.

Some suggestions have been made by the other side that an impartial trial would not be obtained before a jury at Alipore. I cannot accept these suggestions and I must presume that the jury who will try the accused will do what in their conscience they consider to be right and, therefore, in my opinion there is no objection whatever to the case being sent to Alipore, merely because the result of such transfer is that the accused will have the benefit of a trial by jury.

The only real question in this case is as to the balance of convenience. Now, as regards that, the matter is reasonably clear :- because, if the case cannot be tried (as it is admitted it cannot be tried) at Bogra, it must be tried in some other District and it is suggested on behalf of the prosecution that the District should be Dinajpore. But it appears that the bulk of the witnesses are not residents of Dinajpore. As regards Alipore, on the other hand, we find that nearly all the important witnesses for the prosecution live in, or near, that District. Both Messrs. Smart and Coates who are the chief witnesses are said to live at Barrackpore; it is said that Mr. Bruce lives at Calcutta, as also does his servant Shaik Dond; as also Shaik Shahebar servant of Mr. Smart and Subedar Miah another servant, Babu Chundi Das Ghose, is Deputy Magistrate, Sealdah and Babu Runglal, is the Peshkar of that Deputy Magistrate, the other witnesses are Railway servants, station masters, guards, &c. It is not clear where the Railway servants live but it is obvious that they can be as easily obtained from the terminus of the Railway that is, Sealdah, as from any intermediate stations and the guards' head quarters are at Calcutta.

I think, therefore, that the balance of convenience in this case dictates that the trial should be held at Alipore and the case will accordingly be transferred to that District.

Coxe J.—I agree.

K. B.

Appeal allowed; conviction and sentence set aside; retrial ordered; case transferred.

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CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

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1908.

April, 30.

May, 5.

RADHA KANTA LALI.

vs.

KING EMPEROR.

*Police Act (V of 1861), sections 17, 19—Special constable, appointment as—
Refusal to serve—Prosecution—Riot or disturbance of the public peace—
Ordinary police force insufficient.*

It is only when there is a danger of riot or other disturbance of the public peace and the police force available is insufficient to preserve the peace and protect the inhabitants of the village where disturbances are apprehended that a person may be appointed a special constable under section 17 of the Police Act.

If the Magistrate apprehends that a certain individual is about to commit a breach of the peace he may be proceeded against under section 107 Criminal Procedure Code, but he cannot be made a special constable under section 17, nor does he, on his refusal to act, render himself liable to prosecution under section 19 of the Police Act.

Ben Madhub Singh v. Emperor (1) and *Gopi Nath Pargah v. Emperor* (2) followed.

Rule obtained by the Accused person.

Sanction to prosecute under section 19 of the Police Act.

The material facts and circumstances appear from the judgment.

Messrs P. L. Roy and Ashgar, and Babu Atul Chandra Dutt for the Petitioner

Babu Srish Chandra Chowdhry (Junior Government Pleader) for the Crown.

C. A. V.

May, 5.

The judgment of the Court was as follows:—

This is a rule to show cause why the prosecution of the petitioner under section 19 of Act V of 1861 should not be set aside on the ground that his appointment under section 17 of the act was not justified by the terms of that section.

It appears that on a recommendation of the Sub-divisional Magistrate of Nawadah, the District Magistrate of Gaya appointed the petitioner and 12 other persons as special constables under Act V of 1861, and the petitioner was, also by an order of the District Magistrate, appointed a special lance constable for a period of 6 months, commencing from the 17th December 1907.

* Criminal Revision Case No 337 of 1908 against the order of the District Magistrate of Gaya, dated the 28th February 1908.

(1) (1908) 12 C. W. N. 366.

(2) (1886) 2 C. L. J. 555.

On the 14th January 1908 the Sub-divisional Magistrate of Nawadah, issued a notice to him calling on him to appear before him on the 23rd January, 1908, to show cause why he should not be prosecuted for not obeying their orders.

• By an order of the District Magistrate of Gya dated the 28th February 1908, he is now being prosecuted under section 19 of the Act, and it is this order that we are asked to set aside.

It has been urged by Mr. P. L. Roy Counsel for the petitioner that as the appointment of the petitioner under section 17 of the Act, was not warranted by law, he was justified in refusing to act as special constable, and that therefore his prosecution under section 19 of the act is illegal.

Mr. Roy has drawn our attention to the case, *Beni Madhub Singh v. the Emperor* (1), as an authority for his contention. We feel no doubt that the order under section 17 of the Act was inexpedient and unnecessary. The petitioner had a dispute about property with a lady named Najima Begum who he alleged was the mistress of his father now dead.

It is entirely this dispute, and not any riot or general disturbance of the peace, which led to his being appointed a special constable. The petitioner complains that the sub-divisional Magistrate has espoused the cause of Najima Begum, and has consequently instituted various criminal proceedings against him, in which he has been uniformly successful and finally had been appointed a special and a lance constable, so as to interfere with the prosecution of his Civil dispute with Najima Begum. We need not enquire into this matter. sufficient to say that in the case of *Beni Madhub Singh v. Emperor* (1), it has been laid down that "The circumstances which justify an order under section 17 are that a disturbance of the peace is apprehended and that the police force available is insufficient to preserve the peace, and protect the inhabitants of the village where disturbances are apprehended. The same principles were laid down in *Gopi Nath Paryah v. Empress* (2). We doubt if there was ever any danger of a disturbance of the peace. If there was, it would appear that it was not such as the ordinary police were unable to cope with. There has been no disturbance of any kind. If there had been, the petitioner could not, as a special constable, have prevented it, and there was really no necessity to appoint him to be a special constable. If the Magistrate apprehended that the petitioner was about to commit a breach of the peace, he could

(1) (1908) 12 O. W. N. 366. I. L. R. 35 Cal. 454 (2) (1886) 2 C. L. J. 555 (562).

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have instituted proceedings against him under section 107, Criminal Procedure Code ; but in our opinion the orders appointing him a special constable and particularly a special lance constable, were entirely unnecessary and inexpedient. For these reasons, we make the rule absolute and set aside the order for the prosecution of the petitioner under section 19.

N. K. B.

Rule made absolute.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

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Criminal Procedure Code (Act V of 1898), section 107—No Evidence—Party agreeing to be bound down—Order without jurisdiction.

No person can be bound down under section 107 of the Criminal Procedure Code without any evidence being recorded that he is about to commit a breach of the peace, even though he may agree to be bound down.

Rule obtained by the Accused.

Order under section 107 of the Criminal Procedure Code.

The necessary facts appear from the judgment.

Mr. Huq and Babu Manmatha Nath Mukerji for the Petitioner.

The judgment of the Court was delivered by

Rampini J.—This is a rule calling upon the District Magistrate to show cause why the order complained of should not be set aside on the 1st and 3rd grounds mentioned in the petition. The order complained of is one binding down the petitioner under section 107, Criminal Procedure Code. When the proceedings were instituted against the petitioner he appeared and, as the Magistrate records, agreed to be bound down. He said he was a poor man and he had very little expectation of getting any benefit by fighting the case. He, therefore, agreed to be bound down. There was an appeal to the additional Magistrate and he says : " The learned pleader who appeared for the petitioner before me urged that as no evidence was taken, the binding down is illegal. It seems to me, however, that the case is a clear one and it is the duty of the Criminal Court, at least in my opinion, to come to a finding which will be fair to the parties and maintain rights which

* Criminal Revision No. 255 of 1908 against the decision of J. R. Blackwood Esq., Additional District Magistrate of Backergunge affirming that of Babu Jogendra Kumar Ghose, Deputy Magistrate of Perojpur, dated the 27th November 1907.

they really possess." It appears to us that the proceeding of the Magistrate was illegal, because no evidence was taken. There was no evidence to show that the petitioner was about to break the peace. It is true that the petitioner agreed to be bound down. But that does not make him guilty. The proceeding under section 107, Criminal Procedure Code, is a precautionary measure and not a trial for an offence, and in such a proceeding no one should be bound down unless it is shown that he is about to commit a breach of the peace. We, therefore, make the rule absolute.

N. K. L.

*Rule made absolute.**Before Mr Justice Rampini and Mr Justice Sharfuddin.*

DASARATHI MAHAPATRA

v.
RAGHU SAHU.

Indian Penal Code (Act XLV of 1860), Sec. 147—Rioting—Common object—No express finding—No question as to common object—Prejudice.

Where the common object of an unlawful assembly is clearly set out in the charge and there is no question in the lower Courts as to the common object so set out, a conviction for rioting with the object set out is good even though there might be no express finding as to the common object, if the accused has not been in any way prejudiced by the absence of such finding.

Sahir v. Queen Empress (1) and Poreah Nath Sircar v. Emperor (2) distinguished.

Rule obtained by the accused.

Conviction for rioting.

The material facts and circumstances appear from the judgment.

Mr Monnier and Babu Bidhu Bhusan Ganguli for the Petitioners.

Babu Dasarathi Sanyal for the Opposite Party.

The judgment of the Court was delivered by

C. A. V.

Rampini J.—This is a rule to show cause why the conviction of, and sentences passed on the accused should not be set aside. The accused have been convicted under section 147, Indian Penal Code of rioting and sentenced to undergo rigorous imprisonment for a month and to pay a fine of Rs. 20. They have been found to

* Criminal Revision No. 242 of 1908 against the decision of B C Sen, Esq., Magistrate, Balasore, dated 27th February 1908, affirming that of Babu B. Chowdhuri, Deputy Magistrate, dated 3rd February 1908.

(1) (1894) I L. R. 22, Calc. 376.

(2) (1905) I. L. R. 33 Calc. 295; 2 C. L. J. 516.

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have attacked the complainant and others, while cutting their paddy. The accused's party were about 30 in number. The complainant was beaten and wounded and taken to the *thanah* in a *duli*.

The main question debated in the lower Courts was as to the possession of the land. Both the Courts below found that the complainant had been in possession of the land since 1905. His predecessor-in-interest, that is, his father-in-law, had obtained a decree in the Civil Court, had been put in possession of the land by the Civil Court and an under-raiyat named Shibo Jana, who had been in actual possession till then, had gone out and the complainant's father-in-law and the complainant had been ever since in direct possession and cultivation. The accused had therefore no possible right to interfere with the complainant, when cutting the paddy. They have been rightly convicted of an offence under section 147, Indian Penal Code.

The learned Counsel for the petitioner impugns the conviction on technical grounds, the principal of which is that there is no finding in the judgments of the lower Courts, as to the common object of the unlawful assembly. He relies on the rulings in the case of *Sabir v. Queen Empress* (1), and *Poresb Nath Sircar v. Emperor* (2), as authorities for holding that this is essential. The charge in this case was, however, properly drawn. The common object was therein stated to be, to enforce a right or supposed right. Now there was no contest in either of the lower Courts as to the common object. Nobody ever contended that the common object of the assembly, if any, was not to enforce a right or supposed right. The lower Courts have therefore not discussed this question, and have come to no express finding, couched in so many words, on this point; but it is clear that they both impliedly have found that the common object of the unlawful assembly was as stated in the charge.

In the case of *Sabir v. Emperor* (1), it is only said that there should be a clear (not an express) finding as to the common object, and the reason for that expression of opinion was that in that case there were two possible common objects of the assembly and it was not apparent which of them had been accepted by the Judge and the Jury. In the case of *Poresb Nath Sircar v. Emperor* (2), according to Mr. Justice Mookerjee, the judgment of the Magistrate contained no finding what the

(1) (1894) I. L. R. 22 Calc. 276.

(2) (1906) I. L. R. 33 Calc. 295. 2 C. L. J. 516

common object of the assembly was, and the facts found by the Sessions Judge completely negated the common object, set out in the charge, which it is pointed out was not stated with due precision. The accused were therefore held to have been prejudiced. The facts of the present case are very different. As has been already explained, there is no defect in the charge. It was never contended that the common object of the assembly was or could be other than that set out in the charge. No plea on the point was raised in either of the lower Courts, and from the judgments of both Courts it is clear that they found the common object of the assembly to be the same as stated in the charge. The accused have in no way been misled or prejudiced.

We discharge the rule. The petitioners must be remanded to jail to undergo the remainder of their sentences.

N. K. B.

Rule discharged.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

SUJJAD AHMED CHOWDHURY

v.

PARBATI CHARAN ROY AND OTHERS.*

Criminal Procedure Code (Act V of 1898), Sec. 145—Jurisdiction—Notice, want of—No written statement called for—No opportunity to adduce evidence.

A Magistrate has no jurisdiction to pass an order under section 145 of the Criminal Procedure Code without giving notice to the parties, without calling for written statements from them and without giving an opportunity to cite witnesses or to put in documentary evidence.

Rule obtained by the 1st Party.

Order under Sec. 145 of the Criminal Procedure Code.

The material facts and arguments appear from the judgment. *Babu Dasarathi Sanjal* for the Petitioner.

Mr P. L. Roy and Babu Anilendra Nath Roy Chowdhuri for the Opposite Party.

The judgment of the Court was delivered by

Rampini J.—This is a rule to show cause why the order complained of should not be set aside.

The order complained of is one under section 145, Criminal Procedure Code, directing that the second party shall remain in possession of the disputed land until evicted therefrom in due

* Criminal Revision No. 137 of 1908 against the order of Moulvie Aminul Islam, Sub-divisional Officer of Jangipur. Murshidabad, dated 19th December 1907.

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course of law. It appears that there was a dispute with regard to two plots of land extending over an area of 1200 bighas. The police thought that a breach of the peace was likely to occur in connection with these lands, and as far as we can see it seems to us that the proceedings of the Magistrate were very irregular. In the first place he did not, after drawing up the proceeding under section 145 issue notices to the parties. He apparently called the parties before him and he says that on the 15th December last Johad Ahmed Chowdhury, brother of Sajjad Ahmed Chowdhury, the first party, and Ganga Charan Saha, agent of Parbati Charan Roy met him with a view to settle the dispute amicably, but no agreement could be arrived at and so at the request of Johad Ahmed a proceeding under section 145, Criminal Procedure Code, was drawn up and the 19th December was fixed in the presence of both the two persons Johad Ahmed Chowdhury and Ganga Charan Shaha for enquiry in the case. As far as we can see no notices as required by section 145, Criminal Procedure Code, were served on either of the parties. We see it is recorded in the ordersheet that notice was taken to the *am-mukhtear* of the 1st party Babu Paresch Nath Das on the 19th December, but he refused to receive it. Then two mukhtears Babus Kali Kanta Sircar and Lal Mohamed Haji appeared in Court on behalf of the first party on that date. They did not file any mukhtearnama so they were not listened to. The Magistrate then proceeded to take the evidence of one witness of the name of Ganga Charan Guha on behalf of the second party and decided that there was a likelihood of a breach of the peace and that the second party was in possession of the disputed land. When he passed his order neither party had filed written statements. A written statement, on behalf of the second party was filed after the *ex parte* order under section 145, Criminal Procedure Code, had been passed. It appears to us that the Magistrate's proceedings in this case are very irregular and they must have prejudiced the first party. This irregularity was so great as to amount to a want of jurisdiction and to justify our interference. No notice was ever served on the 1st party in accordance with the provisions of sub-section 3 of section 145, Criminal Procedure Code. No notice was fixed on a conspicuous place in the locality though that may not be essential to the legality of the proceedings. No written statement was received from either party at the time when the order was passed and there had been no appearance on behalf of the first party and no opportunity given

to cite witnesses or to put in any documentary evidence. In these circumstances we do not think that the Magistrate was justified in passing the order which he did. We accordingly set it aside as it was passed without jurisdiction, and make the rule absolute.

N. K. B.

Rule made absolute.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

GIRIDHARI MARWARI

v.

EMPEROR.*

Sanction to prosecute—Prosecution piecemeal—Further enquiry—Notice to accused—Criminal Procedure Code (Act V of 1898), section 437.

It is not desirable that a case should be proceeded with against a person, piecemeal. Where therefore a person could not be tried on a major charge without the sanction of the Civil Court.

Held, he ought not to be tried for minor offences.

An order under section 437 of the Criminal Procedure Code made without notice to the person proceeded against is bad. Such notice and an opportunity to shew cause why the order should not be made, can be given without impropriety after such person has been arrested and brought before the Court.

Haridas Sanyal v. Saritulla (1) and Waked Ali v. Emperor (2) followed.

Rule obtained by the Accused.

Order for further enquiry.

The material facts and arguments appear from the judgment of *Babus Dashrathi Sanyal and Suresh Chandra Mukherjee* in the Petitioner.

Mr. Sinha for the Crown.

C. A. V.

The judgment of the Court was delivered by

Rampini J.—This is a rule to show cause why an order for further enquiry made by the Magistrate of Bhagalpore on the 22nd February last should not be set aside.

The petitioner is alleged to have abetted the fabrication of a forged bond and to have committed various cognate offences. This case was enquired into by a Deputy Magistrate who on the 27th August 1906 discharged him. The District Magistrate then ordered a further enquiry into the case to be made. This order was set aside by this Court on the 4th December 1906.

* Criminal Revision No. 303 of 1906 against the order of F. F. Lyall Esq., Magistrate of Bhagalpur, dated 22nd February 1906.

(1) (1888) L. L. R. 16 Calc. 608

(2) (1905) L. L. R. 32 Calc. 1090.

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Sujjad Ahmed Chowdhury

Parbati Charan B

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1906.

April, 30.

May, 4.

Signed by
S. N. Dasgupta
S. N. Dasgupta
S. N. Dasgupta

NOT EXCHANGEABLE AND
NOT SALABLE.

May, 4.

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The order of this Court was that the order of the District Magistrate directing a further enquiry could not be supported, inasmuch as it merely states that a further enquiry is ordered but it gives no reasons whatever on the part of the District Magistrate for differing from the view taken of the case by the Subordinate Magistrate. Moreover it appears in the case that the order was passed by the Magistrate without giving any notice to the accused of the application. We think that certainly in case of this sort the Magistrate before he passed any order directing a further enquiry ought to have issued a notice to the accused and to have heard what he had to say in opposition to the application. Now the District Magistrate has on the 22nd February last again ordered a further enquiry to be made into the case against the petitioner, again omitting to give him a notice or calling upon him to show cause why this order should not be made.

Again the propriety of the order is impugned on 2 grounds, (1) that the question of the genuineness of the bond has been tried by the Civil Court, which has held it to be a forgery and that the case against the petitioner cannot proceed without the sanction of the Civil Court, (2) that no notice was given before the further enquiry under section 437 was ordered. To this Mr. Sinha for the District Magistrate of Bhagulpur replies (1) that the decision of the Civil Court has altered the circumstances and that although the case against the petitioner cannot proceed as regards the main charge of forgery, or abatement of forgery without the sanction of the Civil Court, the charges against him under sections 423 Penal Code and 82 of the Registration Act can be so proceeded with : (2) that the law does not require notice to be given before an order under section 437 can be made : (3) that in this case, it was not advisable to give a notice, as the Magistrate had received information that the petitioner was about to abscond.

But it would seem to us that (1) it is desirable if the case against the petitioner is to proceed that it should not be proceeded with piecemeal and that therefore the sanction of the Civil Court should be obtained to his prosecution on the main charge before any further proceedings against him are taken ; (2) though the law does not prescribe the giving of a notice before an order under section 437 can be made, the Full Bench decision of this Court in *Haridas Sanyal v. Saritulla* (1) recently followed in *Wahed Ali v. Emperor* (2) does require such a notice to be given,

and any order under section 437 made without giving such a notice, must under the rulings of this Court, be set aside. The notice can be given, and an opportunity afforded the petitioner to show cause why the order for further enquiry should not be made, without impropriety after his arrest and after he is brought before the Court.

We accordingly make the rule absolute and set aside the order of the Magistrate of Bhagalpur, dated the 22nd February last complained of.

N. K. B.

Rule made absolute.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

BRAJENDRA KISHORE ROY CHOWDHURY

v.

CLARKE.

House search—Indian Arms Act (XI of 1878), section 25 Code of Criminal Procedure (I of 1898) sections 94, 105, 165—Judicial Officers Protection Act (XVIII of 1850), section 1

The defendant who did not, before causing the search of the plaintiff's house to be made, first record the grounds of his belief as provided for by section 25 of the Arms Act, could not justify the search under the provisions of the said act.

As there was no proceeding pending before him, the defendant was not a 'Court' within the meaning of section 94 of the Code of Criminal Procedure, and therefore the defendant could not direct a search to be made in his presence under the provisions of section 105 of the Code.

The search having been for the purposes of discovering arms generally, section 165 of the Code did not apply.

Conducting a search for arms is not an act done in discharge of a judicial duty. Act XVIII of 1850 (Judicial Officers Protection Act) does not apply to such a case.

Even where a defendant's *bona fides* in conducting a search is established, it does not release him from the obligation the law casts upon him as being in supreme control of the search party from seeing that the search was conducted in a proper and reasonable manner. In such a case the damages should be substantial and not merely nominal.

Suit for damages for wrongful trespass &c.

This suit was originally instituted in the Court of the 3rd Subordinate Judge of Mymensing (1). After the written

* Extra ordinary Original Civil Jurisdiction.

(1) Original suit No 74 of 1907 before the 3rd Subordinate Judge of Mymensing.

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statement had been filed in this suit the defendant on the 26th November 1907 applied to the District Judge of Mymensing for the transfer of the case to his file from the file of the Subordinate Judge on the ground that having regard to the circumstances of the case "it was desirable for the purposes of justice that the said case should be tried in the District Judge's Court which is the highest judicial tribunal in the district." The plaintiff thereupon applied before the High Court in its extraordinary original civil jurisdiction for a transfer of the case to the High Court. This application was granted.

Mr. A. Chowdhury (with Messrs. Chakrabarti, Roy, Pugh and Lahiri) for the Plaintiff.

Mr. Gregory (with Mr. Bagram) for the Defendant.

Mr. Chowdhury.—This is a simple case of trespass. But the defence is that the defendant is protected by various statutes. First of all, it is said that section 25 of the Arms Act justifies the search. But it cannot apply, as the defendant did not comply with the provisions of the section before commencing the search. Strict compliance with the provisions is absolutely essential where the liberty of a subject is to be infringed. *Secondly*, the provisions in the Code of Criminal Procedure relating to search are contained in sections 96, 98, 105 and 165. Sections 96 and 98 do not apply and therefore the Magistrate had no power to direct a search in his presence under section 105. Section 165 also does not apply as it refers to police officers only. Lastly, the defendant is not protected under Act XVIII of 1850 as he is not an "officer acting judicially" nor is the act of search ordered by him an act "done by him in discharge of his judicial duty." It is a purely executive act alleged to have been done to keep the King's peace.

Mr. Bagram.—Although the defendant did not record his reasons as directed by section 25 of the Arms Act, it was only a technical mistake which ought not to penalise a man who was doing his best to preserve the peace of the district. There may be occasions when a delay of even a few minutes may be great moment. In any case the Magistrate acted *bona fide*. Under section 165 of the Criminal Procedure Code, a police officer can make a search. In this case the defendant accompanied the police officers and was near at hand to direct and control them. As to the Judicial Officers Protection Act, it is very difficult to state which act of a Magistrate is judicial and which executive, both judicial and executive functions being

vested in the same man. A particular act may be both judicial and executive at the same time.

C. A. V.

The judgment of the Court was as follows:—

In this suit the plaintiff, who is a wealthy zemindar in the district of Mymensingh, sues the defendant, who is a member of the Indian Civil Service and was during the month of April 1907 District Magistrate of Mymensingh, to recover damages for an alleged trespass committed by the defendant in searching the plaintiff's *cutcherry* at Jamalpore on the 28th of April 1907. The defence raised by the defendant is that he was authorized to conduct the search by statute. The statutory provisions relied on by the defendant are, (a) The Indian Arms Act, 1878, (b) The Code of Criminal Procedure and (c) Act XVIII of 1850 ("an Act for the protection of Judicial Officers").

Now the facts relating to the search may be shortly stated as follows:—On the 28th April 1907 the defendant who was then at Mymensingh received in the early morning an urgent telegram from Mr. Barneville, the sub-divisional officer, and Mr. Luffman, the head of the police at Jamalpore informing him that a riot had narrowly been averted on the previous night. The state of feeling between the Hindus and Mahomedans at Jamalpore had been very intense since the 21st April but the reasons for the origin of that state are not material to be considered here.

Upon receipt of the telegram abovementioned the defendant started for Jamalpore and arrived there at about 10 o'clock in the morning. On his arrival he was informed by Mr. Luffman of the fact that a man named Gander Sheik had been wounded on the previous evening by a shot fired from a revolver or a gun and that the police had heard that the zemindars had been storing firearms in their *cutcherries*.

Upon receipt of this information the defendant determined to search the *cutcherries* of certain zemindars in the district including the plaintiff's *cutcherry* and having summoned certain gentleman to be witnesses of the search, he proceeded on the afternoon of the 28th April to search the *cutcherries* accompanied by Mr. Barneville, Mr. Luffman and a number of police and the witnesses to the search. The plaintiff's *cutcherry* was searched between 3 and 4 in the afternoon and it is with regard to this search that the plaintiff seeks to recover damages in this suit. The defendant admits the fact of the search and that it was done by his orders and under his direction but pleads that he was

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authorised to conduct the search by virtue of the provisions of the statutes above-mentioned.

Now the general rule of the common law is that a Magistrate is liable in an action of trespass for acts done by him to the persons or property of others unless he can justify the act as having been done under the authority of the law. And if a Magistrate pleads a statute or statutes as justifying his acts he must bring himself within the words of the statute strictly.

It becomes necessary therefore in the first place to consider the statutory provisions relied on by the defendant as authorising the search.

The first of these statutory provisions is section 25 of the Indian Arms Act 1878 which is in the following terms :—"Wherever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition, or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace ; such Magistrate having first recorded the grounds of his belief may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammunition or military stores are or is to be found, may seize and detain the same although covered by a license and keep in safe custody for such time as he thinks necessary. The search in such case shall be conducted by or in the presence of a Magistrate or by or in the presence of some officer specially empowered in this behalf by name or in virtue of his office by the local Government." The defendant admits in the present case that he did not before causing the search to be made first record the grounds of his belief as provided by section 25 of the Arm. Act. He says he had no copy of the Arms Act with him although he admits he could have obtained one from the sub-divisional officer in a few minutes.

In these circumstances the defendant not having complied with the provisions of that statute cannot justify the search under the provisions of the Indian Arms Act.

Secondly, the defendant relies upon the provisions of sections 105 and 165 of the Code of Criminal Procedure. Section 105 of the Criminal Procedure Code enacts that a Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant under

provisions of the Code. It is obvious in the present case, the defendant was not competent to issue a search warrant under the provisions of the Criminal Procedure Code. The defendant was not acting as a "court" within the meaning of section 94 of the Criminal Procedure Code as there was no proceeding pending before him.

But then it is said that even if the defendant cannot justify the search under the provisions of section 105 of the Criminal Procedure Code, yet as he took Mr. Luffman along with him who was making an investigation into the case of Gander, the man who had been wounded on the night of the 27th April, the search can be justified as being a search made by Mr. Luffman.

In my opinion this section will not avail the defendant. I am satisfied on the evidence that the search was not intended to be under the provisions of sections 165 of the Criminal Procedure Code. The search of the plaintiff's and the other *cutcheries* was for the purpose of discovering arms generally which section 165 does not authorise.

In my opinion the search made by the defendant was not, nor was it ever intended that it should be, made under section 165 of the Criminal Procedure Code and I accordingly hold that that section does not justify the defendant's action.

Lastly the provisions of Act XVIII of 1850 ("an Act for the protection of judicial officers") are relied on by the defendant. Such Act provides that no Judge, Magistrate, Justice of the Peace, Collector or other persons acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in discharge of his judicial duty whether or not within the limits of his jurisdiction provided that he acted in good faith.

Now in order that the defendant should bring himself within the provisions of that Statute it is necessary that the act done or ordered to be done by him should be done or ordered to be done by him in discharge of his judicial duty. What judicial duty was the defendant performing in conducting the search of the plaintiff's premises? In my opinion he was performing no judicial duties at all. The defendant as District Magistrate has important duties both executive and judicial cast upon him and the defendant was not, I think, performing any judicial duty in conducting the search of the plaintiff's premises for arms.

In these circumstances I must hold that the search of the plaintiff's premises by and under the direction of the defendant

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was not warranted by law. The entry by the defendant into the plaintiff's premises being therefore a trespass, I have to consider before I determine what amount of damages I shall award to the plaintiff whether the defendant was actuated by malice or other improper motives.

It cannot be said in this case that the defendant had any feelings of hatred or revenge against the plaintiff with whom he was not acquainted. It has, however, been argued that the defendant had in the unfortunate disturbances which had arisen between the Hindus and the Mahomedans at Jamalpore taken the side of the Mahomedans and that the search on the 28th April 1907 was really conducted by the defendant owing to the improper feelings that he held against the Hindus at Jamalpore generally. In support of this it is alleged that as the defendant when he arrived at Jamalpore on the morning of April 28th was aware that the Mahomedans had previously announced by beat of drum that the Government had given them permission to loot the Hindus' property and marry their widows in "*nika*" form and that a large number of Hindus were fleeing from the place in a state of panic, if the defendant had honestly done his duty he would in the first place have tried to restore confidence to the Hindus by assuring them of the impartiality of the Government.

It may be that a man of wider experience or riper judgment would have done so but even if I were to assume that this was the primary duty of the defendant this allegation against the defendant only comes to this, namely, that he committed an error of judgment. The defendant was severely cross-examined by the learned counsel for the plaintiff and I am satisfied from what I have heard in this case that the defendant in determining upon the search that was made on the 28th April 1907 was acting *bonafide* and was not actuated by malice or other improper motives against any particular individual or section of the community.

But whilst I find that the defendant was not actuated by malice I cannot absolve the defendant with regard to one matter, namely, that the defendant failed to exercise proper supervision and control over the people under him conducting the search. Now what are the facts relating to the actual search itself? By the time the defendant and the searching party reached the plaintiff's *cutcherry*, the *cutcheries* of three other zemindars and a Hindu temple had been previously searched

without finding anything suspicious. In these circumstances one would have thought that the plaintiff would have then doubted whether the information given to him by the police was correct and would have proceeded with great circumspection, the more especially so, as he admits that at the search of one of the *cutcheries* previously searched a complaint had been made to him by a Hindu gentleman who was accompanying the search party as to the method in which the search was being conducted. What then are the facts relating to the actual search of the plaintiff's *cutcherry*? The servants of the plaintiff (except one Safhallah a Mahomedan who had charge of the keys of the *cutcherry* and who was not on the premises when the defendant and the search party arrived) having fled owing to the panic, it became necessary for the search party to break open the outer door of the *cutcherry*. Having thus effected an entrance some of the Mahomedan mob which had collected and were accompanying the search party were requisitioned to go and bring "*daos*," and assist in opening the boxes which contained the zemindary papers. That the search was conducted with unnecessary damage to the property of the plaintiff cannot to my mind be doubted for an instant. The papers out of various boxes in the *cutcherry* were strewn haphazardly on the floor of the *cutcherry*. Mr. Horniman of the "Statesman" newspaper who accompanied by Mr. Newman of the "Englishman" newspaper had been specially delegated to proceed to Jamalpore and report on the state of the disturbances at Jamalpore has graphically described the condition of affairs as he found them at the plaintiff's *cutcherry* on May 1st. I am satisfied on the evidence that the state of affairs at the plaintiff's *cutcherry* on May 1st was the same as it had been left on the conclusion of the search.

It is only fair, however, to the defendant to state that he had no previous experience in conducting a search and that he did not himself enter the *cutcherry*, but relied on the police to conduct the search in a proper manner. But whilst this goes to establish the defendant's "*bonâfides*," it does not release him from the obligation the law casts upon him as being in supreme control of the search party from seeing that the search was conducted in a proper and reasonable manner.

Turning then to the question of damages I am of opinion that the conduct of the defendant has not been such as the damages to be awarded should be exemplary. But whilst I think that the damages should not be exemplary, I also think that

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they must be substantial. I am unable to accede to the argument of the learned counsel for the defendant that the damages in this case should be purely nominal.

Having given the matter the best consideration that I can, I think the justice of the case would be met if I order the defendant to pay to the plaintiff Rs. 500 as damages. The defendant must also pay to the plaintiff his costs of this suit on scale No. 2.

Mr. H. N. Dutt, Attorney for the plaintiff.

Messrs. Sanderson & Co., Attorneys for the defendant.

S. C. R.

APPELLATE CIVIL.

*Before the Hon'ble R. F. Rampini, Acting Chief Justice and
Mr. Justice Ryves.*

JAMADAR SINGH

v.

SERAJUDDIN AHAMMAD¹ CHOWDHRY AND OTHERS.*

*Civil Procedure Code (XIV of 1882), Sec 13, Expl. II.—Matter—Subject
matter need not be same—Rent Suit—Ex parte decree.*

A sued B for rent for a certain period and obtained an *ex parte* decree which was executed. A then sued B for rent for a subsequent period, B took as defence that he was entitled to credit for sums which he alleged had been paid before the first suit was brought, and credit for which ought to have been allowed in that suit.

Held, that this defence was not open to B as he might and ought to have taken it in the former suit.

Explanation II to section 13 of the Code of Civil Procedure does not lay down that the issue and the subject matter of the two suits must be the same but that the matter directly and substantially at issue must have been directly and substantially at issue in the previous suit. It is not necessary that the subject matter of the two suits should be the same and that the matter of the subsequent suit should have been heard or have been finally decided by a competent Court in the former suit.

Sri Gopal v. Pirthi Singh (1) followed.

Dictum of Banerji J. in *Kailash Monaul v. Baroda Sundari Das* (2), *Woomesh Chandra Maatra v. Baroda Das Maatra* (3), *Rajendra Nath Ghose v. Tarangini Das* (4) and *Suryiram Marwari v. Barhaddeo Pershad* (5) distinguished.

* Appeal from Appellate Decree No. 1030 of 1906, against the decree of H. Walmsley, Esq., Officiating District Judge of Dacca, dated the 31st March 1906, reversing that of Babu Khetra Nath Dutt, Subordinate Judge, 1st Court, of Dacca, dated the 31st August 1905.

(1) (1897) I. L. R. 20 All. 110 (F. B.) (3) (1900) I. L. R. 28 Calc. 17.

(2) (1897) I. L. R. 24 Calc. 711 at 714. (4) (1904) I C. L. J. 248.

(5) (1905) I C. L. J. 337.

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June, 5, 11, 17.

Appeal by the Defendant.

Suit for arrears of rent due under a lease.

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The facts of the case appear sufficiently from the judgment of Ryves J.

Dr. Priya Nath Sen for the Appellant.

Babu Surendra Nath Guha for the Respondents.

C. A. V.

The judgments of the Court were as follows :

June, 17.

Rampini C. J.—The defendant is the appellant before us. The facts of the case are fully set forth in the judgment of the District Judge.

The only question we have to decide is whether the District Judge is right in holding that the *ex parte* decree for rent due from Pous 1306 to Pous 1308 had the effect of *res judicata* and of deciding that all accounts between the parties up to Pous 1308 were finally settled. There is no question as to the payments made during the period for which rent was sued in the previous suit. The defendant paid Rs. 1,400-8 and the plaintiff, in the previous suit, credited him with Rs. 842 only, deducting Rs. 548-8 on account, it is said, of half mutation fees alleged by him to have been realised by the defendant from the raiyats. It is to be noted that the decree in the previous suit was duly executed. The first Court finds that the plaintiff has not satisfactorily established that the defendant realised these fees, and the District Judge has not displaced this finding. If the *ex parte* decree has not the effect, as the Judge holds it has, of settling all accounts between the parties and starting them with a clean state from the last quarter of 1308, then the question of set off claimed by the defendant in this suit should have been enquired into.

Now, the decree was no doubt an *ex parte* one and decided no other question than that the defendant owed the plaintiff the sum of Rs. 842 for rent after deducting Rs. 548-8, credited to another account. But this latter sum is the very sum which the defendant claims to set off in this suit. It was held in the previous suit to be due from the defendant because the plaintiff had deducted that amount from the payments proved on account of other debts due from the defendant. If the defendant did not agree to that deduction, he should have raised in the previous suit the defence he raises in the present one, and, as he did not do so, under explanation II to section 13 Civil Procedure Code, I consider that he cannot raise it now.

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The learned pleader for the appellant, however, contends that this is not so, for two reasons (1) that the question at issue in the previous suit was different from that at issue in the present suit, and (2) that explanation II to section 13 cannot be relied on, as the subject matters of the two suits are not the same.

I am, however, of opinion that the question which the defendant raises in this suit is the very question which was at issue in the previous suit, *viz.*, what was the amount of rent due from the defendant for the period—Pous 1306 to 1308. The plaintiff in that suit alleged that it was Rs. 842. The defendant did not traverse this allegation, which he should have done, if he contended that he had paid more than Rs. 842. The defence which the defendant raises in this suit is the very same as what he should have raised in the previous suit, *viz.*, that he did not owe so much as Rs. 842 for that period and that the plaintiff had improperly failed to credit him with the sum of Rs. 548-8. In support of his second plea, the learned pleader for the appellant has cited the following cases, *viz.*, *Sarkum Abu v. Rahaman Buksh* (1), *Kailash Mondul v. Baroda Sunāari Dasi* (2), *Woomesh Chandra Maitra v. Barada Das Maitra* (3), *Rajendra Nath Ghose v. Tarangini Dasi* (4), and *Surjuam Marwari v. Barhamdeo Persad* (5). I do not think it necessary to discuss all these cases at length. It is sufficient to say that, although in some of these cases there are expressions which support the plea of the learned pleader for the appellant, I think all that is meant is that, as held by Banerji J in *Rajendra Nath Ghose v. Tarangini Dasi* (4), "the explanation would have meaning and effect where the subject matter is the same in the two suits or where the subject matter of the second suit is the same as that of the issue tried in the first suit, notwithstanding that any ground of attack or defence, was not, expressly raised". The limitation that for explanation II of section 13 to have any application, the subject matters of the two suits must be the same, is not to be found in section 13 itself. If this view were strictly applied, then, in suits for arrears of rent there could be no *res judicata* at all for the subject matters of successive suits for arrears of rent are necessarily different. But what the rulings cited by the learned pleader for the appellant must mean is, as laid down by section 13, that the matter directly and

(1) (1896) 1. L. R. 24 Calc. 83.

(3) (1900) 1. L. R. 28 Calc. 17.

(2) (1897) 1. L. R. 24 Calc. 711.

(4) (1904) 1 C. L. J. 248.

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substantially at issue must have been directly and substantially at issue in the previous suit. They cannot and do not, in my opinion lay down that both the issues, *and* the subject matters of the two suits must be the same, before explanation II can be applied. Now, I have already pointed out that the question as to the amount of rent due by the defendant from 1306 to 1308 was the question at issue in the previous rent suit against the defendant and is at issue in the present one. It is, therefore, in my opinion, not necessary that the subject matters of the two suits should be the same.

Another point as to the application of explanation II to section 13 on which there is some conflict is as to whether the matter which might and ought to have been raised in the former suit, but was not so raised, must have been heard and finally decided in the previous suit. As pointed out in the Full Bench case of *Sri Gopal v. Parthi Singh* (1) this would not seem to be required. Seeing that the decree in the previous rent suit against the defendant has been duly executed, it is clear that the matter of the set off the defendant now claims has been at least finally decided in the previous suit. I would, therefore, dismiss this appeal with costs.

Ryves J.—The facts of this case are as follows :

The plaintiffs (respondents) the zemindars leased an *ijara mehal* to defendant (appellant) by a registered lease on 19th Bhadra 1306, (*i. e.* 4th September 1899) for a period of seven years at an annual rental of Rs. 800 payable by quarterly instalments of Rs. 200 with a stipulation that any sum not paid on due date should carry interest at 2 per cent per mensem. In 1902 the plaintiffs brought a suit in the Court of the Subordinate Judge of Dacca against the defendant to recover arrears of rent and interest due under the lease up to the instalment of Pous in the year 1308. (January 1902).

In the plaint of that suit the plaintiffs stated that, out of the whole amount of rent which had become due, they had received from the defendant sums aggregating Rs. 852 towards the rent ; and, giving credit for that amount, prayed to recover the balance. Notice of the suit was served on the defendant, who is a resident of the District of Mozafferpore. He, however, did not appear ; the suit was decreed *ex parte*. The defendant made no attempts to challenge that decree and allowed execution to be taken out against him for the full amount decreed.

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On the 1st April 1903 the plaintiffs brought the present suit, out of which this appeal arises, in the same Court against the defendant, for arrears of rent due under the same lease, for five instalments from Chéyt 1308. The defendant contested the suit, and the main defence was that, for the period covered by the previous suit, he had in fact paid sums amounting to Rs. 1,400-8 *as rent*, whereas the plaintiff had given him credit for Rs. 852 only. In the written statement it is stated "in the said suit (*i. e.* the previous suit) the plaintiffs did not give credit for the total amount of Rs. 548-8-0 paid by the defendant on different dates on account of the rent of the mehal under claim. ... The defendant is entitled to get credit for the said amount and a set off against the present claim; and the defendant accordingly prays for the same. As the plaintiffs have brought the present suit by artfully omitting to credit the said amount, they cannot get any relief. All the documents that are with the defendant showing that the aforesaid amount has been paid, are filed herewith."

In the first Court, it was contended on behalf of the plaintiffs that this plea of "set off" was barred by the rule of *res judicata*.

This plea was overruled by the Court of first instance, which held that Rs. 448-8-0 had in fact been paid by the defendant towards the rent for the period covered by the former suit and had wrongly been credited by plaintiffs to another account, and, deducting this amount, gave plaintiffs a decree for the balance claimed. This decree was reversed on appeal by the District Judge.

The defendant has appealed to this Court. The only ground pressed in appeal is that the rule of *res judicata* does not apply. It was argued that that rule does not apply, *firstly*, because the subject matter of the two suits was not identical, being sums of money due as rent for different years, and *secondly*, that the issue in this case, whether Rs. 548-8-0 had been paid by defendant to plaintiffs as rent in the years covered by the former suit, had not been "heard and finally decided" in that suit and that consequently that decision did not bar the hearing of the issue in this suit.

A number of authorities were relied on in support of these arguments and I will refer to them later.

The fundamental principles on which the rule of *res judicata* is based are well-known and are common to all modern jurisprudence.

It has been said "Justice requires that every cause should be once fairly tried and public tranquillity demands that, having been tried once, all litigation about that cause should be concluded for ever between those parties."

Reading section 13 of the Code of Civil Procedure together with explanation II, the meaning of the rule, it seems to me, would run. "No Court shall try any suit or issue in which the matter directly, and substantially in issue, has been directly and substantially in issue, or which might and ought to have been directly and substantially in issue, in a former suit between the same parties etc."

If this reading is correct, then it seems to be clear that the fact whether this sum of Rs. 548-8, now claimed had or had not been paid by the defendant might and ought to have been made an issue in the former suit and cannot be re-opened. In effect the decision of the first Court is equivalent to a denial by the Court that this sum had been paid and not credited as now alleged by the defendant because it found that the amount due for rent for the period of the suit was as stated by the plaintiff—from this finding it follows that the Court held on the materials before it that the statement of the plaintiffs that Rs. 852 only had been paid by the defendant was correct. The decisions of the Privy Council seem to me conclusive in this view. They are *Kameswar Pershad v. Raj Kumari Ruttan* (1), and *Sri Gopal v. Pirthi Singh* (2); I need not refer to other authorities.

The rulings relied on by the learned pleader for the appellants are the following, *Sarkum Abu Torab Abdul Waheb v. Rahman Buksh* (3). According to the head note to that case, it was there decided "the relief claimed in the second suit was not *resjudicata*, the subject matters of the two suits being distinct." In the body of the judgment, however, it appears that the Court held the second suit was quite different from the first. Thus at page 90 the judgment runs: "In the suit of 1881 the question of the title of the plaintiffs as *Khadims* was not raised either directly or indirectly. They sued them as strangers to the office and failed in their suit in consequence of having put their claim exclusively upon that footing." That being so it was held that the second suit, based on a totally different title, was not barred. It is significant, too, that after examining a number of authorities quoted in support of the opposite view, their Lordships held,

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(1) (1892) I. L. R. 20 Calc. 79; L. R. 19 I. A. 234.
(2) (1902) I. L. R. 24 All. 249. (3) (1896) I. L. R. 24 Calc. 83.

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immediately before the sentence above quoted, "these cases go to show that when a question has necessarily been decided in effect though not in express terms between the parties to a suit, it cannot be raised again although in a different form between the same parties in another suit."

Now, as I have said above, decision of the first Court in effect was that Rs. 852 only had been paid by the defendant as rent for the years covered by that suit. This case, therefore, on examination does not seem to help the appellant. The next case was *Kailash Mondul v. Baroda Sundari Dasi* (1). At first sight that case and certain observations of Banerjee J. in particular, do appear to support his argument. The learned Chief Justice said "all that the Court previously decided was that a particular amount of rent he claimed was due from the defendant to the plaintiff. Can it be said to follow that the rent now claimed is of necessity, by reason of that decision, equally due from the defendant or that the defendant is to be debarred from setting up any defences he may have to the present action?"

He goes on to say with reference to explanation II "we have no materials before us to enable us to say that the matter which the defendant now desires to set up might or ought to have been made ground of defence in the particular action in respect of that particular rent."

This is enough to distinguish this case. It is true in that case Banerjee J observed at page 714, and his observations have been embodied in the headnote, "granting that the matter now in issue might and ought to have been made a ground of defence in the former suit, the question still remains whether it 'has been heard and finally decided' by the Court within the meaning of section 13." It is very difficult to see how a matter which *ex hypothesi* was not before the former Court could possibly have been heard and finally decided by it : and it seems to me that if this were necessary, the whole of explanation II would be rendered meaningless. In *Woomesh Chandra Maitra v. Barada Das Maitra* (2), Ameer Alf and Brett JJ, quoted with approval the *dictum* of Banerjee J, in the last-mentioned case, but as they add "we do not know what the nature of the former suit was, as the pleadings are not before us" it may be that, in the materials available in the present litigation, they would have arrived at a different conclusion. In *Rajendra Nath Ghose v. Tarangini Dasi* (3), Banerjee J. followed his *dictum* in *Kailash Mondul v.*

(1) (1897) I. L. R. 24 Calc. 711.

(2) (1900) I. L. R. 28 Calc. 17.

(3) (1904) 1 C. L. J. 248.

Baroda Sundari Dasi (1), and went further holding apparently that that explanation II to section 13 applies not only when the matter which ought to have been made a defence in the former suit has been finally determined in the former suit, but also only when the subject matter of the two suits is identical. If this is so, the rule can never apply to rent suits or to suits in which claims are made on a periodically recurring liability. This would very materially restrict the usefulness and policy of the rule, although there is no apparent reason but rather the contrary why it should not apply in all its fullness to litigation naturally constantly recurring and arising out of one and the same transaction.

The only other case referred to us in this connection was *Surjiram Marwari v. Barhamdeo Persad*, (2) in which Mookerjee J. adopted the dicta of Banerjee J in the last mentioned case. In discussing the Privy Council decision of *Sri Gopal v. Pirthi Singh*, (3) however, that learned Judge says in page 250. "The true test is, as, Sir Ford North puts it in *Sri Gopal v. Pirthi Singh*, (4), could the first mortgagee, if he had set up his earlier security, obtain in the previous suit what he asks now and thus avoid the necessity for the subsequent suit." Applying this test to the present suit I certainly think the rule of *resjudicata* operates as a bar to raising the issue of set off.

With reference to all these latter cases it is open to consideration how far they are affected by the decision of the Privy Council in *Sri Gopal v. Pirthi Singh* (3). In that case when before the Full Bench of the Allahabad High Court (4) the case of *Kailash Mondul v. Baroda Sundari* (5), on which these latter decisions are largely based, was discussed, the Full Bench held in the clearest terms, contrary to that decision, "it is quite certain that in order to make section 13 of the Code of Civil Procedure applicable it is not necessary that the matter of the subsequent suit should have been heard or have been finally decided by a competent Court in the former suit, when the case is one to which Explanation II applies." The Privy Council in upholding the decision of the Full Bench would seem at least inferentially to have agreed in the reasons for that decision. If so, the authority of these later decisions, so far as they are inconsistent with *Sri Gopal v. Pirthi Singh* (4) would seem to have been shaken.

For the above reasons I would dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

(1) (1897) I. L. R. 24 Calc. 711.

(2) (1905) 1 C. L. J. 837.

(3) (1902) I. L. R. 24 All. 429

(4) (1897) I. L. R. 20 All. 110.

(5) (1897) I. L. R. 24 Calc. 711.

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*Before Sir Francis W. Maclean, K. C. I. E. Chief Justice and
Mr. Justice Doss.*

*BIRAJ MOHINI DAS

v.

KEDAR NATH KARMOKAR.*

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May, 15.

Evidence, admissibility of—Compromise, petition of—Criminal proceedings, withdrawal of—Order not incorporating terms of petition.

On account of some dispute between the parties which resulted in Criminal proceedings, a petition was presented in those proceedings and in consequence they were withdrawn but no order was passed incorporating the terms of the petition.

A suit for increased rent was afterwards brought by one of the parties against the other on the basis of the petition.

Held: that the petition being unregistered and affecting immovable property exceeding Rs. 100 in value, was not admissible in evidence.

Pranali Anni v. Lakshmi Anni (1), *Kali Charan Ghosal v. Ram Chandra Mandal* (2) and *Birbhadra Rath v. Kalpataru Panda* (3) referred to.

Appeal by the Plaintiff.

Suit for rent.

The facts of the case and arguments appear sufficiently from the judgment.

Babu Gunada Churn Sen for the Appellant.

Babu Monmotha Nath Mukerji for the Respondent.

The judgment of Court was as follows :

Maclean C. J.—The only question on this appeal is whether a petition which was filed in certain criminal proceedings between the present plaintiff and defendant is admissible in evidence when it has not been registered. There was some dispute between the parties, which resulted in criminal proceedings and the petition in question was presented in those proceedings ; and in consequence they were withdrawn, but no order was passed incorporating the terms of the petition. The question in the present suit is, as to the amount of rent payable by the defendant to the plaintiff. It is a rent suit. As to the rent payable before the date of the petition, there is no question and a decree has been passed in the plaintiff's favour in respect of that rent.

* Appeal from Appellate Decree No. 518 of 1907, against the decree of Babu Jogendra Nath Mukerjee, Subordinate Judge, 2nd Court of 24 Perganahs dated the 30th November 1906, reversing that of Babu Behari Lal Chatterji, Munsiff, 1st Court, of Sealdah, dated the 7th April 1906.

(1) (1899) I. L. R. 22 Mad. 508 ; L. R. 26 I. A. 101.

(2) (1903) I. L. R. 30 Cal. 783.

(3) (1905) 1 C. L. J. 388.

But the plaintiff says that, having regard to the terms of the *solenamah* as contained in the petition, he is entitled to more, to which the defendant replies that the plaintiff can not rely upon the petition because it has not been registered and not having been registered is not admissible in evidence. The petition, so far as is material runs thus: "The disputed 1 bigha-15 cattahs land which has been in my possession from before will continue to be in my possession for nine years more *i.e.* from 1310 B. S. to 1318 B. S. After that the landlord will be able to make settlement of the land as he likes. For the said land I will give to, *Biraj Mohiny Dasi* 4½ *aris* of *Gula* paddy annually, and this *Rajinamah* will be considered as *Pottah Kabulyat*. I will not therefore prosecute this case any further." The document, defines the area of land, the rent to be paid, the duration, in point of time, of the tenancy, and the parties treated it as a *pottah kabulyat*. This document is the foundation of the plaintiff's title to the increased rent, and as the plaintiff must fall back upon the petition itself, that cannot, unless it is registered affect the immovable property comprised therein, exceeding 100 rupees in value, or be receivable in evidence of the transaction affecting that property. If this petition had been filed in a civil proceeding, and the petition had been followed by an order or decree which embodied, directly, or indirectly, its terms, then it would not have been necessary to have had it registered. But this has not occurred in the present case, and as this document is the root of the plaintiff's claim, to the increased rent, it ought to have been registered: and in the absence of registration it is not admissible in evidence. This view seems to be consistent with the Privy Council decision in *Pranal Anni v. Lakshmi Anni* (1); with the decision of this Court in *Kalu Charan Ghosal v. Ram Chandra Mandal* (2), and with the principle involved in a more recent decision of this Court in *Birbhadra Rath v. Kalabataru Panda*, (3).

The appeal, therefore, fails and must be dismissed with costs.

Doss J.—I agree.

A. T. M.

Appeal dismissed.

(1) (1899) I. L. R. 22 Mad. 598;

(2) (1903) I. L. R. 30 Cal. 783.

(3) (1905) I C. L. J. 388.

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Biraj Mohini Dasi

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Maclean, C. J.

Before Sir Francis W. Maclean K. C. I. E., Chief Justice and
Mr. Justice Doss.

•MUTTY LALL PAI,

v.

NUNDA LALL NEOGY AND OTHERS *

CIVIL,

1908.

February, 21.

*Equity of redemption of one of the mortgagors, purchase of, by mortgagee—
Mortgage amount, suit for realisation of—share of debt to be deducted.*

A mortgagee purchasing the share of one of his mortgagors is bound to give credit for that which his vendor would have been liable to pay and not the full value of the share purchased.

Mat Lal Singh v. Misree Lal (1). *Bisheshur Dial v. Ram Sarup* (2), *Lakshmidas Ramdas v. Jamnadas Shankar Lal* (3), and *Fakiraya v. Gadigaya* (4), referred to.

Appeal by the Plaintiff.

Suit to enforce a mortgage.

The facts of the case and arguments appear sufficiently from the judgment.

Dr. Rash Behari Ghose and Babus Narendra Chunder Bose and Surendra Chunder Bose for the Appellant.

Babu Bejin Chunder Mullick for the Respondent.

The judgment of the Court was as follows :—

Maclean C. J.—This is a suit to enforce a mortgage. The original mortgagor was one Fulkumari Dasi who is dead, leaving three sons who became equally entitled to the equity of redemption. One of the sons sold his one-third share in the equity of redemption to the plaintiff the mortgagee. The plaintiff now brings this suit to realise his mortgage, and he offers to allow one-third of the mortgage debt, as being the share of that debt which he is liable to pay as the purchaser of a one-third share of the equity of redemption. *Prima facie* that would seem to be right. The mortgagors, however, the owners of the other two-thirds of the equity of redemption claim to deduct from the mortgage debt the full value of the share purchased by the mortgagee. The lower Court has accepted this view, and dismissed the suit; the plaintiff has appealed. The contention

* Appeal from Original Decree No. 366 of 1906, against the decree of Babu Jogendra Nath Deb, Subordinate Judge, 1st Court, 24-Parganas, dated the 31st July 1906.

(1) (1867) 2 Agra. H. C. R. 88.

(2) (1900) I. L. R. 22 All. 284.

(3) (1896) I. L. R. 22 Bom. 304 (F. B.).

(4) (1901) I. L. R. 26 Bom. 88.

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of the defendants can not prevail. If there had been no sale the mortgagor of the one-third share would have been liable only for one-third of the mortgage debt. There is no question here of proportionate value: the shares were equal undivided thirds.

Apart from authority I should have thought that the mortgagee standing in the shoes of the mortgagor to the extent of the one-third share purchased by him, was only bound to give credit for that which his vendor would have been liable to pay, namely, one-third of the mortgage debt. The point, however, is concluded by authority. The case of *Matilal Singh v. Misree Lal* (1), decided some forty years ago and reported in North-Western Provinces High Court Reports, Vol. II page 88, supports the principle I have referred to. That has been followed in several other cases. A Full Bench of the Allahabad High Court in *Bisheshur Dial v. Ram Sarup* (2) held that, where a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same rate to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. The judgement in that Full Bench case was delivered by Mr. Justice Banerjee, who in a previous case *Chunna Lal v. Anandi Lal* (3) had taken a different view. This Full Bench case in the Allahabad High Court followed a Full Bench ruling of the Bombay High Court in the case of *Lakshmi Das Ram Das v. Jamna Das Shankar Lal* (4) where the same principle was acted upon: and, in a subsequent case, *Fakiraya v. Gadigaya* (5) the same view was taken. There is, therefore, a current of decisions extending over a period of forty years, which supports the view for which the present appellant contends. I do not think that any distinction can be drawn between a purchase at an auction sale and a purchase by private treaty. No reason has been suggested for any such distinction.

It is suggested, that the *Kobala* in this case has not been produced. But the plaintiff alleged, in paragraph 4 of his plaint, the effect of that *kobala* and that has not been challenged.

(1) (1867) 2 Agra. H. C. R. 88.

(3) (1896) I. L. R. 19 All. 196.

(2) (1900) I. L. R. 22 All. at 284.

(4) (1896) I. L. R. 22 Bom. 304.

(5) (1901) I. L. R. 26 Bom. 88.

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On the contrary, in paragraph 5 of the written statement, the defendants admit that the plaintiff purchased one-third share of the mortgaged property, though they say that the present suit is not maintainable. If any thing had turned on the terms of the *Kobala*, and it had really been challenged, its production could and would have been directed. The plaintiff is entitled to the decree he asked for, giving credit for one-third of the mortgage debt; and, consequently the judgment appealed against must be reversed and the respondents must pay the cost of this appeal and also the costs that have been thrown away in the first Court, and there will be the usual mortgage decree giving the respondents six months time from the date hereof to redeem the mortgage.

Doss J.—I agree.

A. T. M.

Appeal allowed.

PRIVY COUNCIL.

PRESENT : Lord Macnaghten, Lord James of Hereford, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

DEBENDRA NATH DUTT

v.

THE ADMINISTRATOR-GENERAL OF
BENGAL AND OTHERS

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.]

Administration—Administration bond—Administrator, fraud of—Sureties neither parties to nor cognisant of fraud—Misappropriation—Discovery of fraud—Cancellation and fresh grant of Letters of Administration—Assignment of bond to new Administrator—Sureties, liability of.

A surety to an administration bond is liable under it even though it subsequently transpires that the Letters of Administration were obtained by fraud and are revoked on that ground.

Appeal from a decree of the abovementioned High Court, in its Appellate Jurisdiction (March 23, 1906), affirming a decree [*Debendra Nath Dutt and Banku Behary Banerjee v. Administrator-General of Bengal*, (1)] of the same High Court, in its Ordinary Original Civil Jurisdiction (March 29, 1905) (2).

The question raised on the appeal was whether on the malversation of the estate of a deceased person by the adminis-

(1) (1906) I. L. R. 33 Calc. 713.

(2) (1906) I. L. R. 33 Calc. 718.

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trator appointed by the Court, the *prima facie* liability of sureties under an administration bond given to the Court fails to arise or attach, because the administrator not only committed the acts of malversation in question ; but also obtained the grant of the Letters of Administration to him by means of such a course of fraud that the Letters were liable to be and were afterwards avoided.

In August, 1898, one Edmund Craster Craster (hereinafter called the deceased) died in England, leaving in addition to property in England assets of considerable value in India. The bulk of these assets consisted of 86½ shares in the Bank of Bengal. The deceased left a will, of which probate was granted in England on October 27, 1898, to Thomas Henry Craster and Robert Conway Dobbs. He left three sons and two daughters but none of such sons were named Henry Craster Craster as was subsequently falsely represented as hereinafter mentioned.

On July 29, 1902, one Ernest Hardwicke Cowie, who was then a member of the firm of Sanderson & Co., the solicitors of the Government of India, in Calcutta, presented a petition to the High Court, for the grant to himself of letters of administration of the estate of the deceased as the constituted Attorney of an alleged person Henry Craster Craster, and in such petition falsely stated that the deceased had died intestate and had left the said Henry Craster Craster, his only son and next-of-kin him surviving. The petition was supported by a false declaration by Ernest Hardwicke Cowie and also by a false affidavit by him, and had annexed thereto an alleged power of attorney whereby the said alleged Henry Craster Craster purported to empower Ernest Hardwicke Cowie to make the application. There was no such person as Henry Craster Craster, and the power of Attorney was a forgery.

Upon the presentation of the petition an order of the Court was made in due course for the grant of Letters of Administration of the estate of the deceased to Ernest Hardwicke Cowie for the use and benefit of the said Henry Craster Craster, who then procured, as required by the Indian Succession Act and the practice of the Court, two sureties, namely, the appellant, Debendra Nath Dutt, and one Banku Behary Banerjee, to enter with him into a joint and several bond dated the 15th day of August, 1902 and conditioned as follows in a penalty of Re. 1, 31, 922-4-0 :

The condition of the above written obligation is such, that if the above bounden Ernest Hardwicke Cowie, the administrator

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of the property and credits of Edmund Craster deceased; do make or cause to be made a full and true inventory of all the estate of the said deceased, which has or shall come to the hands, possession, or knowledge of him the said Ernest Hardwicke Cowie or into the hands or possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the Registry of the said High Court, at or before the fifteenth day of February next ensuing, or within such further time as the Court may from time to time appoint : And the same estate, and all other the estate of the said deceased at the time of his death, which, at any time after, shall come to the hands or possssion of the said Ernest Hardwicke Cowie, or of any other person or persons for him do administer according to law : And further do make, or cause to be made, a true and just account of his said administration at or before the fifteenth day of August which will be in the year of our Lord one thousand nine hundred and three, or within such further time as the Court may from time to time appoint. And all the rest and residue of the said estate which shall be found remaining upon the said administration account, the same being first examined and allowed of by the said High Court of Judicature, shall deliver and pay unto such person or persons respectively as shall be lawfully entitled to such residue : And if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said Court, making request to have it allowed and approved accordingly, and if the above bounden Ernest Hardwicke Cowie being thereunto required, do render deliver the Letters of Administration to him granted (approbation of such testament being first had and made) in the said Court, then this obligation to be void and of none effect, else to remain in full force and virtue.

On the record there was another copy of the bond without the word " and " put in italics above.

The sureties appeared to have each received a bonus in the case of one Rs 300, and in the other case Rs. 200, for executing the bond. Upon the execution and delivery to the Court of the bond, the grant of the Letters of Administration was issued to Earnest Hardwicke Cowie, who shortly afterwards sold the whole of the 86½ bank shares for an aggregate sum of Rs. 1,05,595, or thereabouts, and misappropriated and converted to his own use the proceeds of such sale.

Towards the end of the year 1903 and the beginning of the year 1904, discovery was gradually made of the fraud that had been perpetrated by Ernest Hardwicke Cowie. On April 28, 1904, the grant to Ernest Hardwicke Cowie was annulled, and on May 10, 1904, fresh letters of administration were granted to the respondent the Administrator-General of Bengal with a copy annexed of the Will of the deceased. On May 26, 1904, an order of the Court was made that the bond of the 15th of August, 1902, should be assigned to the Administrator-General of Bengal, and the same was duly assigned to him by a deed, dated the 10th day of June 1904.

On June 21, 1904 the Administrator-General of Bengal filed his plaint in the present suit in the High Court of Judicature at Fort William in Bengal against Ernest Hardwicke Cowie and the two sureties, the appellant Debendra Nath Dutt and Banku Behary Banerjee, and thereby sought to recover from Ernest Hardwicke Cowie a balance or sum of Rs. 1,39,901-13-0, as shown by an account thereto annexed, which balance or sum mainly arose from a sum of Rs. 1,07,260-0-0 estimated as the then market value of the 86½ bank shares, and from a further sum in respect of the dividends thereon, but also included a certain cash balance not collected by Ernest Hardwicke Cowie. The plaintiff-respondent also sought to recover from the appellant and Banku Behary Banerjee the full amount of the penalty named in the above mentioned bond, namely the sum of Rs. 1,31,922-4-0.

The first defendant Ernest Hardwicke Cowie did not appear in the suit, and the main defence of the two surety defendants was that the grant of the letters of administration to Ernest Hardwicke Cowie having been obtained by misrepresentation and fraud and therefore being void, the bond was likewise void and unenforceable, both as itself induced and obtained by fraud, and also as entered into under a mutual mistake as to the circumstances and the subject matter of the contract, and also as founded on a misrepresentation—made to the surety-defendants by the Court, namely that Henry Craster Craster really existed and was the only son and next-of-kin of the deceased and that the facts have been well proved to the Court.

The suit was heard before Sale J., and on March 29, 1905 the Court made a decree whereby Ernest Hardwicke Cowie was ordered to pay to the plaintiff-respondent the sum of Rs. 25,100 with interest thereon at the rate of 6 per cent. per annum and

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all the defendants were ordered to pay to the plaintiff-respondent the sum of Rs. 1,07,159-7-7, with interest thereon at the rate aforesaid from the date thereof until realisation. The first amount represented a sum in the hands of Ernest Hardwicke Cowie for which he was clearly liable to the estate of the deceased, but as regards which the Court held that there was no sufficient evidence against the sureties to make them liable. The second amount, for which all the defendants were found liable, was arrived at by debiting them with amounts actually realised by the sale of the bank shares, and with certain dividends thereon after making certain proper deductions of allowances. For the judgment of Sale J., See *Debendra Nath Dutt and Banku Behary Banerjee v. Administrator General of Bengal* (1).

Appeals were filed against that decree both by the appellant and Banku Behary Banerjee. On the first of those appeals, objections were lodged by the plaintiff-respondent to the judgment of Mr. Justice Sale so far as it disallowed the sum of Rs. 25,100, or thereabouts against the appellant and Banku Behary Banerjee. The appeals and the cross-objections were heard before a Court consisting of the Chief Justice Sir F. W. Maclean and Justices Harrington, Stephen, Mitra and Geidt. The majority of the Court, namely Maclean, C. J., and Mitra and Geidt, J. J., were of opinion that the appeals should be dismissed and the minority, namely Harrington and Stephen, J. J., dissented and were in favour of allowing the appeals. In the result on March 23, 1906 a decree was made dismissing the appeal and disallowing the objections. The judgments of the learned judges are reported in *Debendra Nath Dutt and Banku Behary Banerjee v. Administrator-General of Bengal* (2).

Against that decree the appellant, Debendra Nath Dutt, appealed to His Majesty in Council.

Lord Robert Cecil, K. C., and Mr. Boydell Houghton, for the appellant : The deceased left a will, of which probate had been obtained by two of the executors. Consequently the administration granted to Cowie was in itself a nullity and the grant of letters of administration to Cowie was wholly void : *Ellis v. Ellis* (3). The letters of administration being void the bond was also void ; the appointment of Cowie was void and he was not the administrator of the estate of the deceased. The sureties are not

(1) (1906) I. L. R. 33 Calo. 713 at 718 *et seq.*

(2) (1906) I. L. R. 33 Calc. 713.

(3) (1905) 1 Ch. 613 at 617

liable, where the administrator had never been duly appointed : *Holland v. Lea* (1). The appellant is not estopped by the recitals of the bond from showing that Cowie's appointment was void. Where the appointment is not complete, the sureties are not responsible in respect of moneys collected without legal authority : *Kepp v. Wiggott* (2). Here Cowie, whose appointment was wholly void, had no authority to call in the estate of the deceased, and the appellant is not responsible for any money so collected by Cowie.

The bond states upon its face that Cowie is the Administrator of the property and effects of the deceased and was entered into upon the basis that Cowie was, as the appellant and the obligee of the bond believed, the administrator to the estate of the deceased whereas the letters of administration granted to him were in fact void. Both the appellant and the obligee of the bond were under a mistake as to a matter of fact essential to the bond. The bond is, therefore, void : Indian Contract Act (IX of 1872), section 20. The bond is also void owing to it having been entered into by the Court and the sureties under a mutual mistake of fact, *viz.*, the authority of Cowie as attorney of the next-of-kin to apply for and receive a grant of letters of administration a person so authorised by the next-of-kin and in fact administrator, and did not warrant due administration by a person not so authorised. The Court by granting letters of administration to Cowie represented to the sureties that he was the duly authorised attorney of the next-of-kin of the deceased and the person entitled to have such letters of administration granted to him and was the administrator. The appellant relied upon such representation and entered into the bond on that basis. Such representation was contrary to fact and the appellant is not able under a bond entered into on that basis.

Simon, K. C., and C. H. Sargent, for the respondent referred to sections 20 and 21 of the Indian Contract Act and contended that the subject-matter of the transaction in connection with the bond was in fact the due administration of the estate of the deceased by Cowie. Administration has in fact taken place in this case, notwithstanding that letters of administration ultimately proved void *ab initio*, the fact of an administration having taken place is not destroyed, nor is every transaction that has taken place in virtue of such letters is necessarily avoided, particularly in view of section 242 of the Indian Succession Act (X of 1865).

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(1) (1864) 9 Ex. 430.

(2) (1860) 10 C. B. 35.

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The liability of the sureties did not depend upon the validity or invalidity of the grant to Cowie. The sureties made themselves responsible for the due administration by Cowie of the estate of the deceased. He did act under the grant and the validity or invalidity of the grant cannot affect their liability. It is contended by the other side that the execution of the bond by the sureties was induced by misrepresentation of the Court in the grant of letters of administration. But as a matter of fact the issue of such grant was necessarily subject to and contingent on the execution of the bond and subsequent thereto: Indian Succession Act (X of 1865), section 256. The Court in requiring a bond from the administrator and his sureties contemplates not only the effect of mal-administration, but also the chances of the grant being subsequently declared either void or voidable. It is submitted that neither the invalidity of the grant nor the mistake of the Court in accepting the bond is sufficient to discharge the sureties. The language of the last clause of the bond expressly contemplates an event, namely, the discovery of a will of the deceased, which would necessarily make the letters of administration void, and provides in that event for additional and not substitutional obligations on the sureties. The event, which was contemplated, did actually happen. So long as the grant is not revoked it is a good grant. The bond was given as sureties for *de facto* administrator and the sureties are liable for the due administration by him. Cowie broke the condition of the bond by failing to administer the estate of the deceased according to law and thereby caused a loss to the estate. The sureties are liable for such a loss.

It is contended by the other side that the bond is void owing to it having been entered into by the Court and the sureties under a mutual mistake, *viz.*, the authority of Cowie as attorney of the next-of-kin to apply for and receive a grant. But a mis-statement in the recital of an administration bond does not release the sureties: *Lester v. Gooch* (1).

In *Kepp v. Wiggett* (2) relied upon by the other side, the Collector was acting outside his office. But here that is not the case as already pointed out.

Lord Robert Cecil, K.C., in reply: The whole point is whether it is a guarantee for *bona fide* acts of Cowie as administrator or for any acts of his whether he was administrator or not. If the guarantee was that he would discharge his duty

(1) (1868) 17 W. R. 139. Eng.

(2) (1850) 10 C. B. 35.

as administrator, the question arises whether he was administrator. The grant of letters of administration to Cowie being void *ab initio*, he was not administrator at any time. That being so, there was no guarantee.

• *Lester v. Gooch* (1) does not apply here. That case refers to a mis-recital. But here the case is not that of mis-recital. Cowie was, in fact, not the attorney of the next-of-kin.

Reference was made to sections 234 and 262 of the Indian Succession Act (X of 1865).

Lord Macnaghten.—This is an appeal from the High Court of Judicature at Fort William in Bengal.

The appellant, Debendra Nath Dutt, was one of two sureties in a bond conditioned for the due administration by Ernest Hardwicke Cowie, a solicitor in Calcutta, of the estate of a retired Indian Civil Servant named Craster. Mr. Craster died in England in August 1898, leaving a will which was duly proved here in the following month of October. Part of the deceased's estate consisted of shares in the Bank of Bengal and other Indian assets. The Indian assets escaped the notice of the executors and remained unclaimed and outstanding. On the 29th of July 1902, Cowie, who is stated in the printed cases to have been one of the solicitors to the Government, and who certainly was then in good credit, obtained an order for the grant of letters of administration to himself as attorney for a fictitious person represented by him to be the only son and sole next-of-kin of the deceased, who had, as he pretended, died intestate. The letters of administration were issued on the 15th of August 1902, on the production of a bond in the usual form executed by the Cowie and the two sureties, who received a small payment for their services, but were not themselves parties to the fraud or cognizant of it. By these means Cowie obtained possession of the Bank shares, sold them in the market, and converted the proceeds to his own use. The fraud was not discovered till the end of 1903 or the beginning of 1904. Cowie then absconded. He was apprehended, tried, and convicted. The grant of administration in his favour was cancelled, and in May, 1904 letters of administration with a copy of the will annexed were granted to the Administrator-General of Bengal. The bond of the 15th of August 1902 was then assigned to the Administrator-General, and he brought this suit against Cowie and Cowie's sureties. Cowie made no defence. The suit

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was heard by Sale J. That learned Judge pronounced a decree in favour of the Administrator-General, the result of which, so far as regards the sureties, was that they were ordered to pay to the Administrator a sum equal to the amount of the proceeds of the Bank shares mis-appropriated by Cowie together with interest and costs. Both the sureties appealed to the High Court. But that Court in its Appellate Jurisdiction by a majority affirmed the order of Sale J. and dismissed the appeal with costs.

The case of the appellant Dutt, who alone has appealed to His Majesty, as presented to this Board, was that the letters of administration granted to Cowie, having been annulled by the Court on the ground of fraud, must be regarded as a mere nullity from the beginning ; that Cowie, therefore, never was Administrator and that the bond, so far as the sureties were concerned, was void and of no effect ; for the sureties undertook to be responsible for a real Administrator, not for a person assuming to act in a capacity which he never possessed and which the Court could not have conferred upon him. The case was argued very ably by the learned Counsel for the appellant who said everything that could be said on his behalf. But there is really no substance in the appellant's contention. So long as the letters of administration granted to Cowie remained unrevoked, Cowie, although a rogue and an impostor, was to all intents and purposes Administrator. He, and he alone, represented the deceased in India. His receipts were valid discharges for all moneys received by him as Administrator. As Administrator he collected the assets belonging to the deceased in India, and he misappropriated the assets which he so collected. For his acts and defaults as Administrator the appellant and his co-surety became and must remain responsible.

Their Lordships are, therefore, of opinion that Maclean C.J. and the learned Judges who concurred with him were perfectly right, and they will humbly advise His Majesty that the appeal must be dismissed.

The appellant will pay the cost of the appeal.

J. M. P.

Appeal dismissed.

Messrs. Vallance and Vallance—Appellant's Solicitors.

Messrs. Wade and Lyall—Respondent's Solicitors.

PRESENT :—*Lord Macnaghten, Lord James of Hereford, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.*

THE BANK OF BOMBAY

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SULEMAN SOMJI.

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Corporation—Member of the Corporation—Common Law right of the member to inspect books of the Corporation—Presidency Banks Act (XI of 1876)—Bank of Bombay—Shareholder—Suit by shareholder against the Bank to enforce inspection of the register of shareholders—Allegations of irregularities in the management of the Bank, in the election of its board of directors, in advancing money to directors—Object of inspection to communicate with other shareholders—Nature of the suit—Issue of the writ of Mandamus, principles of, regulating the—The right under Statute—The same at Common Law—Absolute right of inspection—Qualified or limited right of inspection.

"On the application of a member the King's Bench Division will, in general, grant a rule for a *limited* inspection of the documents of the corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question depending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was formerly sometimes laid down broadly, and the language ascribed to the Court in one or two cases might almost lead to the inference that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. But any such doctrine is now exploded; and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object." *Taylor on Evidence, Volume 2, par. 1495, approved and followed.*

In cases in this country the above principle applies where there is no Statute conferring upon the members of a corporation a right to inspect, copy or take extracts from the register of its shareholders or any other document belonging to it.

Appeal from an Appellate decree [*Suleman Somji v. The Bank of Bombay* (1)], of the High Court of Judicature at Bombay (January 22, 1907) reversing a decree made by Scott, J, sitting on the original side of that High Court (August 6, 1906).

The principal question raised on the appeal was whether the respondent, a shareholder in the appellants Bank, was entitled to inspect the register of shareholders kept by the Bank.

On July 11, 1906 the respondent instituted the present suit

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against the appellant. The plaintiff alleged that the respondent was a registered holder of one share of the appellant Bank ; that the respondent having observed irregularities in the management of the Bank, in the election of its Board of Directors, in the advancing of large sums of money to its Directors and in other matters relating to the Bank, applied to the Secretary and Treasurer of the Bank to allow him inspection of the register of shareholders so as to enable him to communicate with the other shareholders, and if possible, to obtain their assent to certain proposed resolutions for the better management of the affairs of the Bank, and for the removal of some of the existing Directors, which he intended to bring before a general meeting of the shareholders ; and that the next annual general meeting of the shareholders of the Bank would take place on or about the 9th day of August 1906 and though it was necessary for the objects which the respondent had in view that he should have inspection of the register of shareholders forthwith, the Bank had refused to give him inspection of such register though since the 4th day of June 1906 he had repeatedly applied for the same.

Annexed to the plaint was a copy of the correspondence hereinafter referred to.

The respondent claimed the following main reliefs :—

“(a) That it may be declared that he is entitled at all reasonable times to inspect the register of shareholders of the defendant Bank and to copy and take extracts from the said register.

“(b) That the defendant Bank may be ordered to give such inspection and to allow the plaintiff to take copies of and extracts from the said register.

“(c) That the defendant Bank may be restrained by all order and injunction of this Hon'ble Court from preventing the plaintiff from having access at all reasonable times to the said register of shareholders for the purpose of inspection and perusal and from preventing the plaintiff from taking copies of and extracts from the said register”.

On June 4th, 1906, the respondent wrote to the Secretary of the Bank a letter, which referred to a verbal refusal by the latter on the 1st of June, 1906, “to allow me (the respondent) to take a list of shareholders with full addresses”, and closed with a request to furnish him “a list of shareholders with their full addresses on paying for same”.

To that letter the Bank replied on June 7, 1906, that there did not appear to be any provision in the Presidency Banks Act as to the right of a shareholder or other person to claim such a list, but that to enable the Directors to decide definitely on the requisition the respondent should state "for what purpose and under what authority" he required and claimed to be furnished with the list.

To the last letter the respondent replied on the 16th day of June 1906 by threatening legal action to compel the Bank to furnish the list or to give him inspection and he added that he was informed that the Bank had "furnished such lists in other cases."

On June 21, 1906 the Bank replied that "such a list was supplied to a shareholder a few years ago on his satisfying the Board that the purpose for which he required the list was a legitimate one and in his *bona fide* interest as a shareholder" and added "the Directors will be pleased to comply with your request if you will be good enough to similarly satisfy them that you require the list for use in your interest as a shareholder."

On July 5, 1906 the respondent wrote in reply. "It is unfair to me to be asked to state why I require the inspection. There have been gross irregularities in the management of the Bank, in the election of the Directors, in the manner the Directors act and other matters and you preclude me from communicating with the shareholders or taking concerted action by withholding the inspection."

"Please take notice that I have instructed Solicitors to prepare papers to file a suit which will be done within three days from this date unless the inspection is given to me before then."

The issues settled were the following :—

- "1. Whether the plaintiff had at the date of the filing of his suit any cause of action against the defendant Bank?
- "2. Whether the plaintiff required inspection for the protection of his own interests or for any other reasonable purpose?
- "3. Whether the plaintiff is entitled to the relief he seeks in prayers A & B?"

The respondent's Counsel did not lead any evidence but tendered the respondent for cross-examination, of which the following is material for the purpose of this report :—

"I hold one share in the Bank. I purchased it last April. I am at present actively litigating a suit in which the Bank is a formal party as assignor of Dwarkadas Dharamsey."

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"Are you on very hostile terms with the Director?"

Objected to.

"Witness at once answers, No!"

"I had no litigation with Ahmedbhoy Habibbhoy but my brothers had. They are still fighting. I have given reasons in correspondence for wanting inspection. I have also given some reasons in the plaint. I have other reasons also. I began taking an interest in the affairs of the Bank about six months ago. I bought the share as an investment with my own monies. I complain of irregularities in the management of the Bank. I discovered them in April after I bought the share. I bought the share on the 12th. It was transferred to me on the 18th April. The irregularity is that the Bank has advanced money to people beyond the limit fixed by the bye-laws. The amount fixed by the bye-laws is 6 lacs. They have advanced more than 6 lacs to several persons, viz.: Bansilal Abirchand, Bomanji Dinshw Petit Sons & Co. and Ahmedbhai Habibbhoy."

"I don't recollect any other names. They advanced Bansilal every month 6 lacs under a contract for 12 months i.e. 18 lacs for three months. I found this out by seeing Bansilal, Bomanji and Ahmedbhai going to the Bank. I got this information through brokers. There are irregularities also in election of the Board of Directors. The Directors have shares transferred to their nominees. They get themselves elected and sit on the Board. All the Directors do the same when their term comes to get themselves re-elected. I also complain that there are now 7 Directors whereas there ought to be 9 and I intended to bring in two respectable people."

The case was heard by Scott, J. who found all the issues in the negative and on August 6, 1906 dismissed the suit. For a report of the judgment see *Suleman Somji v. The Bank of Bombay* (1).

Against that decree the respondent appealed to the appellate side of the High Court, and on January 22, 1907, the Court of Appeal reversed the decision of Scott, J. and made a decree in the following terms:—

"This appellate Court doth reverse and set aside the said decree dated the sixth day of August one thousand nine hundred and six and in lieu thereof doth declare that the appellant as long as he is a share-holder of the said Bank is entitled at all

reasonable times to inspect the register of share-holders of the respondent Bank and to copy and take extracts from the said register and this appellate Court doth order that the respondent Bank to give such inspection and do allow the appellant as long as he is a share-holder of the said Bank to take copies of and extracts from the said register and this appellate Court doth further order that the respondent Bank is hereby restrained from preventing the appellant as long as he is a share-holder of the said Bank from having access at all reasonable times to the said register of share-holders for the purpose of inspection and perusal and from preventing the appellant as long as he is a share-holder of the said Bank from taking copies of and extracts from the said register and this appellate Court doth lastly order that the respondent Bank do pay to the appellant his costs of the above-mentioned suit and of this appeal when taxed."

For a report of the judgment see *Suleman Somji v. The Bank of Bombay* (1).

The appellant Bank, thereupon, appealed to His Majesty in Council.

Levett, K.C., and Frank Russell, K.C., for the appellant referred to The Presidency Banks Act (XI of 1876), sections 1, 4, 7, 17, 22, 31, 37 and 68; and to the Indian Companies Act (X of 1866), section 231; and also to the Indian Companies Act (VI of 1882), sections 55 and 256. The Presidency Banks have been expressly exempted from the application of the Indian Companies Act to them. The provisions relating to the inspection of the register of share-holder by share-holders of a joint-stock Company registered under the Indian Companies Act are not applicable to this case and under the Presidency Banks Act of 1876 the Bank's share-holders are not entitled to inspect the Bank's register of share-holders, or to copy or take extracts therefrom. The respondent must establish his right, if any, at common law. Subject to the provisions of the Presidency Banks Act a share-holder possesses and enjoys all rights, powers and immunities incident by law to a corporation aggregate. [The Presidency Banks Act, (XI of 1876), section 4.] The common law principle on which inspection is given is that the application must be a *bona fide* application referring to a definite subject affecting the right of the share-holder or member of a corporation: The evidence shows that the respondent had three grievances, namely, irregularities in the management of the

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Bank, in the election of its directors and in the advancing of large sums of money to its directors. There is no single case of grievances, which affects individual right. There is no reference to some defined, distinct dispute, as to which it appears that it might be to the advantage of the respondent to see the register of share-holders of the Bank. In such a case he is not entitled to such inspection : *In re Burton and the Saddlers Company* (1) ; *King v. The Merchant Tailors Company* (2) ; *King v. The Wilts and Berk Canal Navigation* (3), and *Taylor on Evidence* (1906 ed.) Vol. II, p. 1088, para 1405.

The decree appealed from is wrong in any event because it is not confined to the actual occasion in question and the facts before the Court, but gives to the respondent at all times hereafter, while a share-holder, the right to inspect and take copies, without regard to any circumstances which may hereafter arise, in which a refusal by the Bank would or might be expedient and proper.

Mr. De Gruyther, K. C., and Mr. S. A. Kyffin for the respondent : The history of the Presidency Banks Act goes back as far as 1823. There was first the character of the Bank of Bengal dated 29th May, 1823 which was rescinded and cancelled by the Bank of Bengal Act (VI of 1839). The latter Act was repealed by the Bank of Bengal Act (IV of 1862). Lastly there was the Presidency Banks Act (XI of 1876) ; Act VI of 1839, sections 11 and 13 make provision for an annual general meeting of the proprietors of the Bank to elect by their votes two directors, out of six in place of those bound to retire in rotation every year. Act XI of 1876, section 24 provides that the directors of the Bank shall be selected by vote of a general or special meeting. The respondent desired inspection of the register of share-holders to enable him to communicate with other share-holders in order to obtain their assent to certain proposed resolutions for the removal of some of the directors, which he intended to bring before a general meeting of the share-holders. That is a specific question in which the respondent is *bona fide* interested. It is submitted that the Court of appeal was right and its decree should be confirmed.

Up to 1866 the Bank of Bombay did not exist but in 1867 it was incorporated and registered under the Indian Companies Act, 1866 and then the Presidency Banks Act was passed. It is submitted that the later Act does not deprive the respondent of

(1) (1861) 31 L. J. Q. B. 62.

(2) (1831) 2 B. and Ad. 175.

(3) (1885) 8 A. and E. 477.

the statutory right of inspection conferred by The Indian Companies Act.

The Bank is an ordinary banking company and the right must depend upon the nature of the book the respondent wants to examine. He wants to examine the register of share-holders. Inspection of that book does not interfere with the ordinary business of the Company.

Lord Macnaghten : The inspection was not refused.

Mr. De Gruyther : It is alleged in the plaint that the inspection was refused.

Lord Atkinson : There is no evidence to show that.

Lord Macnaghten : You have never been refused inspection.

Mr. De Gruyther : Every share-holder has an absolute right to inspect the register of share-holders without stating any reasons. The respondent in the circumstances of this case and as of right was and is entitled to the inspection claimed by him of the register of share-holders of the Bank. Reference was made to the Presidency Banks Act (XI of 1876), section 31 : and *Mutter v. Eastern and Midland Railway Company* (1) ; and two American Cases, namely, *In re Steinway* (2), and *State of Washington v. Pacific Brewing and Malting Company* (3), referred by the Court of appeal in its judgment, were relied upon.

Mr. Levett, K. C. replied.

The judgment of their Lordships was delivered by

Lord Atkinson—This is an appeal from a decree, dated the 22nd. January 1907, pronounced by the High Court of Judicature at Bombay (sitting in appeal from its Original Civil Jurisdiction), by which a decree, dated the 6th August 1906, of the High Court (sitting in its Ordinary Original Civil Jurisdiction) was reversed and set aside. By this latter decree the respondent's action was dismissed with costs.

The respondent is a holder of one share in the appellant company, the Bank of Bombay, one of the Banks incorporated in 1876 by the Indian Statute of that year entitled the Presidency Banks Act, 1876.

It was suggested that the respondent purchased this share for the purpose of causing annoyance to the Bank owing to the fact that some other litigation to which he was a party had been

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(1) (1888) 38 Ch. D. 92, at pp. 105 and 160.

(2) (1899) 45 L. R. A. pp. 461-475, and 159 N. Y. 259.

(3) (1899) 47 L. R. A. p. 208.

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instituted against the Bank and was still pending. There was no satisfactory evidence given to sustain this allegation.

From the correspondence which took place between the respondent and the Bank before the institution of this suit, it is, in the opinion of their Lordships, perfectly plain that the respondent claimed a right to inspect the register of the share-holders of the Bank, and to be supplied with a list of such share-holders, as absolute and unqualified as is that conferred on the share-holders of joint-stock companies in this country by section 32 of the Companies Act, 1862, or in India by section 31 of the Indian Companies Act, 1866, and section 55 of the Indian Companies Act, 1882.

It must be taken that the appellants refused to recognise this absolute and unqualified right, or to comply with the claim based upon it, but in their letter of the 21st June 1906, which conveyed this refusal, they informed the respondent that they would be pleased to furnish him with the list he asked for, if he would satisfy them that he required it for use in his own interests as a share-holder. It is, therefore, clear that, before action brought, the qualified and restricted right to inspect and take extracts from the register contended for in argument on behalf of the respondent was never asserted, nor any limited demand based upon it ever made or refused.

In the statement of claim the respondent, for the first time, endeavoured explicitly to base his right and title to inspect, copy, and take extracts from, the register on some definite matters in which he himself was interested. He alleges therein that he had observed irregularities in the management of the Bank, in the election of its Board of Directors, in the advancing of large sums of money to its directors, and in other matters, and that he desired an inspection of the register to enable him to communicate with the other share-holders and, if possible, obtain their assent to certain resolutions for the better management of the affairs of the Bank and the removal of some of the Directors, which he intended to propose at the general meeting of the shareholders to take place on the 9th August 1906. But though this is the purpose for which, and the occasion on which he claimed the right to inspect, copy, and take extracts from the register, the decree of the Court of appeal contains no restriction whatever. It is couched in the widest terms. It ignores both the occasion and the purpose, and declares expressly that the respondent, as long as he is a share-holder of the Bank,

is entitled at all reasonable times to inspect the register of share-holders of the Bank, and to copy and take extracts from the said register, and it then proceeds to order that the Bank do give such inspection, and do allow the respondent, as long as he is a share-holder of the Bank, to take copies of and extracts from the register, and then restrains the Bank from preventing respondent, as long as he is a share-holder of the Bank, from having access at all reasonable times to the register for the purpose of inspection and perusal, and from preventing the respondent, as long as he is a share-holder of the Bank, from taking copies of and extracts from the register.

This suit is in truth in its nature, though not in its form, somewhat of the character of an application for a writ of *mandamus*, and the principles regulating the issue of that prerogative writ should, their Lordships think, apply to a great extent to the granting of the relief prayed for in such a suit as this. One of these principles is this, that the writ will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the interference of the Court, that he has claimed to exercise that right and none other, and that his claim has been refused. Nothing less, therefore, than the absolute right claimed by the respondent in the correspondence above referred to could justify the decree appealed from in its present wide and unrestricted form. Now by section 231 of the above-mentioned Indian Act of 1866 and section 256 of the above-mentioned Act of 1882, the appellant Bank is expressly exempted from the operation of each of those statutes.

There is no statute conferring on the members of this corporation a right to inspect, copy, or take extracts from the register of its shareholders, or any other document belonging to it. The only right the respondent can have, therefore against the Bank in reference to such matters, is that which at common law belongs to every member of a corporation. Their Lordships have been referred to several authorities in which the nature, extent, and measure of this right is explained and defined, [*Rex v. The Proprietors of the Wills and Berks Canal Navigation* (1) and *Reg v. Lewisham Union* (2).] The learned Judges in the Bombay Court of appeal have referred to others. The result of the authorities is summed up, in their Lordships' view

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(1) (1835) 3 A. & E. 477.

(2) (1897) 1 Q. B. 498.

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correctly, in "Taylor on Evidence," Vol. 2, par. 1495 (10th edition, 1906) in the words following:—

"On the application of a member the King's Bench Division will in general, grant a rule for a *limited inspection* of the documents of the corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question depending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was formerly sometimes laid down more broadly, and the language ascribed to the Court in one or two cases might almost lead to the inference that members of a corporation have an absolute right whenever they think fit, to inspect all papers belonging to the aggregate body. But any such doctrine is now exploded: and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own and to those documents which would tend to illustrate such right or object."

The strictness with which these limitations on the general and unqualified right of inspection are insisted on may be aptly illustrated by the case of *Rex v. Merchant Tailors' Co.* (1). In that case certain members of a corporation claimed the right to inspect all the documents belonging to that body on the grounds (1) that they had heard and believed the revenues of the corporation were misapplied through the malpractices of those who managed the corporation's affairs; (2) that the fines for admitting freemen and liverymen to the corporation had been unnecessarily and improperly raised; (3) that lavish expenditure had taken place (in some instances to the applicant's own knowledge) without the consent of the majority of the members of the corporation; (4) that a clerk of the corporation had, as the applicants had heard and believed, recently misappropriated funds of the company to a large amount, but that no accounts or information had been laid before the freemen or liverymen by which they could have ascertained the amount of the defalcations; and that they (the applicants) could not ascertain, unless they were allowed to look at the documents mentioned, whether the corporate funds had been properly applied and accounted for or not.

Every member of the Corporation in this case obviously had an interest in each of the matters mentioned, but none of the

(1) (1831) 2 B. & Ad. 115.

applicants had in any of them any special interest different from that of his fellow members, nor had they any definite purpose, or object, in obtaining the inspection asked for other than (in the words of Littledale J.) to see "if by possibility the company's affairs may be better administered than they think they are at present." And the writ of *mandamus* was accordingly refused in this case.

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At the trial no witness other than the respondent was produced, and he was only tendered for cross-examination. He stated that he had heard through brokers that the Bank had advanced 6 lacs of rupees to three persons whom he named: that at elections the directors transferred shares to nominees who voted for them (a practice not in itself illegal): that there were now only seven directors, instead of the maximum nine; that he intended to bring in two respectable people, and that he had in the correspondence given his reasons for asking inspection. It is clear on this evidence that the respondent had no special interest in any of the matters he complained of, or any interest other than, or different from, that of each member of the corporation, and that he had no definite right or object of his own to aid or serve in asking for inspection of the register, or right or object which the register would illustrate; but that, on the contrary, his object was similar to that of the applicants in *Rex v. The Merchant Tailors' Co.*, (1) namely, to obtain the inspection in order to communicate with the share-holders with the view of securing their help in bringing about an improvement in the administration of the corporation's affairs.

Their Lordships think that, on this point, the case is covered by the authority of *Rex v. The Merchant Tailors' Co.*, (1) that the respondent is not in law entitled to the extended right to which the decree declares him to be entitled, that the limited and qualified right contended for at the trial was never put forward, or insisted on, before action brought, or any claim based upon it ever refused, and they are, therefore, of opinion that the decree appealed from is erroneous and should be reversed with costs, and the judgment and order of Mr. Justice Scott restored. They will humbly advise His Majesty accordingly. The respondent must pay the costs of this appeal.

Messrs. Cameron, Kemm & Co. Appellant's Solicitor.

Messrs. Payne & Lattey. Respondent's Solicitor.

J. M.P.

Appeal allowed.

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June, 12.

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Cox.

JOTINDRA NARAIN ACHARJA CHOWDHURY

v.

RAJENDRA KISHORE DAS AND OTHERS.*

Accounts, suit for, maintainability of—Receiver appointing tehsildar—Agent and sub-agent—Indian Contract Act (X of 1872), Secs. 191, 192.

A suit for account is not maintainable by the owner against a *tehsildar* who was appointed by a Receiver to his estate.

The *tehsildar* (defendant) is a sub-agent under the Receiver who may be regarded as the agent of the principal (plaintiff) and as sub-agent he is liable to render accounts to the Receiver and not to the principal.

Appeal by the Plaintiff.

Suit for account.

The facts of the cases shortly stated are as follows :—These were suits for accounts from defendants of the sums realised by them as *tehsildars* of a certain Mouzah. Plaintiff admitted in plaint that the defendants were appointed not by him but by his adoptive mother during the pendency of litigation between himself and her as to eight annas of the estate of his adoptive father. The mother was appointed a Receiver by the High Court during the litigation of the disputed eight annas and she employed the defendant as *tehsildars* in her capacity as Receiver. Plaintiff alleged that the defendant paid only a small amount to his mother and had not rendered any accounts of their realisation in eight annas of the Mouza. Both the defendants in the suits appeared and pleaded *inter alia* that they were not liable to render accounts to the plaintiff.

Babus Dwarka Nath Chuckerbutty and Tarak Chandra Chakravarti for the Appellant.

Babus Mukund Nath Roy and Biraj Mohun Mojumdar for the Respondents.

The judgment of the Court was delivered by

Brett J.—The present appeals arise out of two suits brought against the defendants for accounts. The defendants are said to have been *tehsildar* of certain mouzahs which were in litigation and in respect of which a Receiver was appointed who acted from

* Appeals from Appellate Decrees Nos 2091 and 2092 of 1906, against the decrees of Babu A. N. Mozumdar, Subordinate Judge of Mymensingh, dated the 20th August 1906, confirming those of Babu Hari Charan Gangopadhyaya, Munsiff of Mymensingh, dated the 7th April 1906.

the 2nd June 1900 to 4th September 1902. The defendants were admittedly appointed by the Receiver and were not appointed by the present plaintiff. The suits were brought to recover from the defendants in each case accounts and any sum due after balancing such accounts, from the 2nd June 1900 to 4th September 1902.

The present suits were instituted on the 25th August 1905, that is to say, a few days only less than 3 years from the date when the receiver's appointment had terminated and the defendants were discharged.

Both the lower Courts have held that as the defendants in each case were not agents of the plaintiff, therefore, the plaintiff was not entitled to bring the suits against them for accounts, and on that ground have dismissed the suits.

The plaintiff has appealed and the only contention which has been advanced before us is that the Receiver during her time of office was acting on behalf of the plaintiff, who was subsequently found to be the proprietor of the properties, and therefore that the *tehsildars* who were working under the Receiver were bound to render accounts to the plaintiff.

We do not think that this contention is sound. The defendants in each case appear to have been in the position of sub-agents under the Receiver, who may be regarded as having been the agent of the plaintiff, and as sub-agents they were liable to render accounts to the Receiver and not to the present plaintiff. We think therefore that the lower Courts are right in holding that the suits as framed must fail. Whether the plaintiff could have brought suits to recover any sums due from the defendants as sums received by them on his behalf it is not necessary to consider, but we have only to observe that in the case of such suits the question would certainly arise whether they were not barred by limitation, the sums realised by the defendants, if any, having apparently been realised before the 4th September 1902 when the Receiver was discharged from office.

The result, therefore, is that these two appeals are dismissed with costs.

A. T. M.

Appeals dismissed.

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Jotindra Narain
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Das.
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June, 1, 2, 10,

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

PURKHIT PANDA

v.

ANANDA GAONTIA.*

Jurisdiction, question of, when entertainable in appeal—Civil Court's jurisdiction when ousted—Central Provinces Land Revenue Act (XVIII of 1881), Secs. 4 (8a), 152—Gochur and common lands—Gaontia, a proprietor—Ejection, suit for—Court to enquire rights at the time of filing of plaint—Entry in settlement record, presumption, evidence—Central Provinces Tenancy Act (XI of 1898), Sec. 2 (10)—Holding of a survey number

If the question of jurisdiction depends for its determination upon facts not found by the lower Courts, an appellant can not ask the High Court to find them; the appellant must substantiate his contention if he can, on the facts already found. If he is unable to point to any facts in respect of his plea, that plea must fail.

The ordinary Civil Courts can not be ousted of their jurisdiction in the absence of an express provision of law to that effect

Manbodh v. Asai (1) referred to.

Gochur lands can not be classed in the same category as common lands.

A *gaontia* of a Government village in the Sambalpur District is a proprietor and is entitled to bring an action in ejection.

The Civil Courts must adjudicate on the rights of the parties as they existed when the plaint was filed and not on any title subsequently derived.

Ramanadan Chetti v. Pulikutte Serrai (2) referred to.

The entry in the settlement record is not conclusive; it is only a matter of presumption.

The holding of a survey number in section 2 (10) Explanation II of the Central Provinces Tenancy Act has reference to the holding when the proceedings in a Civil Court are initiated, and it can not avail a person that in a subsequent settlement he was recorded as a tenant.

Appeal by the Defendant.

Suit to eject the defendant from certain waste lands.

The facts of the case and argument are sufficiently stated in the judgment.

Babu Sarat Chandra Roy Chowdhury for the Appellant.

Babu Bepin Chunder Mullick for the Respondent

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The judgment of the Court was as follows:—

The plaintiff, as a *gaontia* of the village, sued to eject the defendant from certain waste lands described as *gochur* lands on the ground that the defendant was a trespasser. The defendant

* Appeal from Appellate Decree No. 1701 of 1906, against the decree of Purna Chandra Mitra Esq., District Judge of Sambalpur, dated the 25th May 1906, affirming that of Babu N. Ghosh, Munsiff of Sambalpur, dated the 13th March 1906.

(1) (1896) 10 C. P. L. R. 17.

(2) (1898) I. L. R. 21 Mad. 288.

pleaded adverse possession for upwards of 12 years, and set up a tenancy of the land in question under the plaintiff. Both the Courts below have found in favour of the plaintiff, and they have directed him to be put in khas possession of the plots in suit.

In second appeal, four contentions have been addressed to us on behalf of the defendant appellant: *First*, that the Civil Court had no jurisdiction to entertain the suit; *secondly*, that a *gaontia* in the district of Sambalpur cannot eject an occupier of land through the Civil Court, but that he can do so through the agency of the Settlement Department at the periodical quadrennial revisions of settlement; *thirdly*, that whether the defendant paid rent or not to the plaintiff, he is a tenant of the land and cannot be ejected as being a trespasser; and *fourthly*, that inasmuch as the defendant was recorded and recognized by the Settlement Officer as a raiyat at the recent settlement, he cannot be ejected in the suit of a *gaontia*.

The question of jurisdiction was not taken at any previous stage in this litigation. It is not referred to in any of the grounds of appeal, nor did it form the subject of any of the issues raised. But in accordance with settled law on the subject, we allow it to be taken in second appeal; though if that question depends for its determination upon facts, and those facts have not been found by the lower appellate Court, or the Court of first instance, an appellant cannot ask this Court to find them: the appellant must substantiate his contention, if he can, on the facts already found. If he is unable to point to any facts in support of his plea, that plea must necessarily fail. The learned vakil for the defendant appellant relies on the provisions of section 152 of the Central Provinces Land Revenue Act (XVIII of 1881). That section provides (a) no "Civil Court shall entertain" any suit instituted or application made to obtain "a decision or order on any matter which the Governor-General in Council, the Chief Commissioner or a Revenue or Settlement Officer is by this Act empowered to determine or dispose of; and in particular (b) no Civil Court shall exercise jurisdiction over any of the matters provided for in sections forty, forty-one, forty-two and eighty-nine as to waste lands". He has also called our attention to section 77 (b) of the said Act which says "the Settlement Officer may determine disputes regarding the rights of persons resident in the village or holding lands comprised in the mehal, in or to the common land of the mehal, and its produce and the village site." We are not aware whether the Settlement Officer was empowered

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in the manner prescribed by the Act to determine or dispose of the precise question arising between the parties to the present litigation; nor are we aware of the precise meaning to be attached to the expression "common land." These are matters which ought to have been brought forward in the lower Courts in order that the necessary facts bearing upon the question of jurisdiction might have been decided so that the question of law might have been subsequently raised and determined in special appeal if not earlier. On the facts as we find them in the judgment of the lower appellate Court, we do not see that there was any defect of jurisdiction. It admits of no doubt that the ordinary Civil Courts can not be ousted of their jurisdiction in the absence of an express provision of law to that effect.

As a matter of construction we think that *gochur* lands cannot be classed in the same category as common lands. *Gochur* lands appear to be lands reserved for the proprietor of a Government village in the district of Sambalpur while, on the other hand 'common lands' appear to be the property of the general body of villagers.

The case of *Manbodd v. Asai* (1), although not precisely in point, shows that the Civil Courts cannot be ousted of their jurisdiction in the absence of specific notifications issued by the Chief Commissioner under the I and Revenue Act. We accordingly overrule the first contention in bar.

Then with regard to the contention that a *gaontia* cannot eject an occupier of land through the Civil Court, it is urged the *gaontia* is not in the position of a proprietor but that he is a mere farmer under the Government. This view does not derive support from section 4 (8a) of Act XVIII of 1881, where the word 'proprietor' is defined as including a *gaontia* of a Government village in the Sambalpur District except in section 4 clause (b), and in sections 61, 62, 63 and 69. The excepted sections refer to allowances made to excluded proprietors and to the determination or record of *Sir* land. For the purposes of the present suit, the plaintiff as *gaontia* of the village must be taken to be a proprietor of the same and entitled to bring an action in ejectment.

On the third contention that whether the defendant paid rent or not, he is a tenant on the land and cannot be ejected as a trespasser, we can not disturb the finding of the lower appellate Court that the defendant is a trespasser and that he has not

succeeded in making out his tenancy. We have, however, thought it proper to consider the provisions of the Acts brought to our notice, although on the findings arrived at by the two lower Courts, it was not necessary to do so.

Lastly, the recognition of the defendant's tenancy by the settlement Department took place after the institution of the suit giving rise to the present appeal, and the Civil Court must adjudicate on the rights of the parties as they existed when the plaint was filed and not on any title subsequently derived, see *Ramanadan Chetti v. Pulikutti Servai* (1), Moreover, the entry in the settlement record is not conclusive. it is only a matter of presumption. Nor can the defendant be regarded as a tenant within the meaning of section 2 (10), Explanation II of of the Central Provinces Tenancy Act (XI of 1898), which says "the holder of a survey number in a village let in farm by Government, or held by a *gaontia* in the Sambalpur District is a tenant of the farmer or *gaontia* for the time being." The holding of a survey number must of course, have reference to the holding when the proceedings in a Civil Court are initiated, and it cannot avail the defendant that in a subsequent settlement he was recorded as a tenant. He may be a tenant in the eye of the settlement Department, but for the purposes of the present litigation we cannot regard him as such.

In the result, the decision of the lower appellate Court appears to be quite correct and we accordingly dismiss the appeal with costs.

A. T. M.

Appeal dismissed

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April, 24, 28.

*Before Sir Francis W. Maclean Kt., K. C. I. E., Chief
Justice and Mr. Justice Doss.*

BEPIN BEHARI KUNDU AND OTHERS

v.

DURGA CHARAN BANDOPADHAYA.*

CHANDRA KUMAR DAS GUPTA AND OTHERS

v.

DURGA CHARAN BANDOPADHAYA.*

PROFULLYA KUMAR ROY AND OTHERS

v.

DURGA CHARAN BANDOPADHAYA.*

HARA NATH BANDOPADHAYA AND OTHERS

v.

DURGA CHARAN BANDOPADHAYA.*

*Hindu Law—Widow, alienation by, without legal necessity—Consent of female
reversioners—Alienec, nature of estate taken—Proper purpose—Presumption.*

Per curiam. The consent of a female reversioner to the sale by a Hindu widow without legal necessity does not bind or affect the reversioner who takes an absolute estate. The alienec gets only the qualified estate of the alienor.

Koer Goolab Singh v. Rao Karun Singh (1), *Varjean Rangji v. Ghelji Gokaldas* (2), *Vinayak v. Gound Venkatesh* (3), and *Abinash Chandra Mazumdar v. Hari Nath Shaha* (4), referred to.

Such consent does not raise a presumption of law that the purposes for which it was made was proper.

Appeals by the Defendants.

Suits for possession of property.

The facts of the case and argument appear sufficiently from the judgment of Doss J.

Dr. Priya Nath Sen for the Appellants.

Babu Baikuntha Nath Das for the Respondent.

C. A. V.

The judgments of the Court were as follows:—

Maclean C. J.—As I concur in the fuller judgment about to be delivered by my brother Doss, I propose to say but little.

* Appeals from Appellate Decrees Nos 2279 to 2282 of 1906, against the decrees of W. S. Coutts Esq., District Judge of Faridpur, dated the 29th October 1906, affirming those of Babu Remola Charan Majumdar, Subordinate Judge of Faridpur, dated the 30th July 1904.

(1) (1871) 14 M. I. A. 176.

(2) (1881) I. L. R. 5 Bom. 563.

(3) (1900) I. L. R. 25 Bom. 129; 2 Bom. L. R. 820.

(4) 1904) I. L. R. 32 Calc. 62.

April, 28

This is a suit for possession of certain property. Both Courts have decreed the suit. The facts are stated in the judgment of the lower appellate Court and I need not recapitulate them. The defendants claim the property under certain conveyances made by one Sonamoni who enjoyed, in that property, the estate and interest of a Hindu widow. The plaintiff, who is the reversioner, contends that those conveyances are not binding on him. It has been found that the sales were not effected for legal necessity. It is, however, urged for the appellant that the sales were made with the consent of the then reversioners Bindu Basini and Baroda, both of whom were purdanashin women. There is no finding that there was any such consent: and this strictly should dispose of the appeal. But if there were, it is only the consent of two women, whose interest was the limited one of Hindu widow: This consent could not bind or affect the present plaintiff who takes an absolute estate. Then it is said their consent raises a presumption of the propriety of the transaction. I do not think that the consent—even if any there were, which is not found—of these two purdanashin women, whose position of dependence is so well recognised in India, could have any such effect.

These views are in accordance with the authorities cited in the judgment of my learned colleague. All the points fail, and the appeals must be dismissed with costs.

Doss J.—The plaintiff who is the respondent in this appeal, sued as the sole reversionary heir of his maternal grandfather Kali Kant Roy to recover possession of certain properties from the defendants, who claimed to hold them under a purchase from the widow of Kali Kant Roy.

Kali Kant died leaving a widow Sonamoni and three daughters, Barada Sundari, Bindu Bashini and Mokshada. Sonamoni died on the 4th Bysack 1307, i. e., the 16th April 1900. Barada Sundari predeceased her mother, without leaving any male issue. Bindu Bashini who survived her mother died on the 4th Assin 1307, that is the 20th September 1900, leaving a son, the present plaintiff. Mokshada became a widow, when she was a child and consequently could not be an heir under the Hindu law. Sonamoni inherited a widow's estate in the properties left by her husband, and her two daughters were the next reversionary heirs at the time.

On the 17th Pous 1287, that is the 31st December 1880, when both Barada Sundari and Bindu Bashini were living and

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plaintiff had been born, and was a minor, the widow Sonamoni conveyed by a Kobala the properties in suit to the father of the defendants.

Plaintiff seeks to recover possession of this property on the ground that on the death of his mother, Bindu Bashini, on the 20th September 1900, he became solely entitled to succeed to it as his reversionary heir. The principal ground, (among others, to which it is needless now to refer) upon which the claim was resisted by the defendants was that the alienation was made by the widow for legal necessity, and with the assent of her two daughters.

Both the Courts below have concurrently found that the defendants have totally failed to prove the existence of any legal necessity justifying the sale, and have accordingly decreed the plaintiff's suit.

The only point which has been raised before us in second appeal is that the Courts below ought to have held that the consent of the daughters to the alienation by the widow raised a presumption of law that the purpose for which it was made was proper, or that, at any rate, it is some evidence of the propriety of the transaction.

There is no finding by either of the Courts below that the daughters assented to the sale. That being so, the foundation of the contention fails.

But even assuming for a moment that the daughters did, in fact, give their consent to the sale, I am still of opinion that in the circumstances of this case, it does not raise any presumption of law that the purpose for which the alienation was made was proper, so as to pass an absolute and indefeasible estate in favour of the alienee. The reversionary estate of the daughters at the date of the alienation was of a limited and qualified character, and was contingent upon their surviving the widow. If the widow had made a gift of the property to the daughters, the effect of the transaction would have been to accelerate the contingent limited estate of the daughters, and to reduce it into an estate in possession. It would not have conferred on them any larger estate than the limited and qualified estate to which they would have succeeded had they survived the widow. It would not have conferred on them an estate transmissible to their own heirs; *Isri Dut Koer v. Musst. Hansbutti Koerin* (1), *Duli Sing v. Sunder Singh* (2), *Bhupal Ram v. Lachma Kuar* (3). For

(1) (1883) L. R. 10 I. A. 150. 1 L. R. 10 Calc. 324.

(2) (1892) 1 L. R. 14 All. 377.

(3) (1888) 1 L. R. 11 All. 253.

the same reasons, if the widow had, with the concurrence of the daughters alienated the property in favour of a stranger, the alienee would not have taken any larger estate than the limited and qualified estate of the widow or of the daughters, for the alienee cannot have a larger estate than that possessed by the alienors, and the coalition of the estate of the widow with that of the daughters not having the effect of amplifying the *quantum* of the resultant estate; *Kher Goolab Sing and others v. Rao Kurun Sing* (1), *Varjwan Rangji v. Ghelji Gokaldas* (2), *Vinayak v. Govind Venkatesh* (3), *Abinash Chandra Mozumdar v. Hari Nath Shaha* (4).

The result, no doubt, would have been different, if the next reversionary heirs concurring in the alienation had not been females, but males entitled under the law to succeed to an absolute estate of inheritance. *Bajrang Singh v. Mani Karnika Buksh Sing* (5), *Naba Kishore Surma Roy v. Hari Nath Surma Roy* (6)

If then the real operative effect of consent by a female reversioner to an alienation by a widow, be such as I have stated, it is somewhat difficult to see how it can raise a presumption of law that the purpose for which the alienation was made was proper, and then indirectly through the medium of such a presumption, confer on the alienee a larger estate than that which it directly and without the aid of such a presumption, it is incapable of conferring. In *Varjwan Rangji v. Ghelji Gokaldas* (2), in which the widow had made a similar alienation with the consent of her daughter, Bai Bhakat, Sir Charles Sergent, in delivering the judgment of the Court, said — "Nor can the mere concurrence of Bai Bhakat, albeit the nearest in succession, (having regard to the state of dependence in which all women are supposed by Hindu law to have their being) be regarded as affording the slightest presumption that the alienation was a justifiable one." In *Vinayak v. Govind Venkatesh* (3), Jenkins C. J., quoted this opinion with approval and adopted it as part of the reasoning in his judgment.

The passage cited by the learned vakil for the appellant from the judgment of the Privy Council in the *Collector of Masuli-*

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(1) (1871) 14 M. I. A. 176.

(2) (1881) I. L. R. 5 Bom. 564.

(3) (1900) I. L. R. 25 Bom. 129, 2 Bom. L. R. 820.

(4) (1904) I. L. R., 32 Calc. 62.

(5) (1907) L. R. 35 I. A. 1, I. L. R. 30 All. 1.

(6) (1884) I. L. R. 10 Calc. 1102.

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patam v. Cavalry Vencata Narainapah, (1) in support of his contention does not touch the present case, because as the previous context shows, their Lordships were there dealing with the case where the reversionary heirs are collaterals, that is male heirs entitled to succeed to an absolute estate of inheritance, subject to the estate of the widow. Similarly in the passage cited from the judgment of the Privy Council in *Rajlukhee Debea v. Gokool Chunder Chowdhury* (2), their Lordships were evidently referring to male reversioners.

As to the second branch of the contention that the consent of the daughters is, at any rate, some evidence of the propriety of the alienation, the Courts below having found that beyond the mere recitals in the *kobala*, there is absolutely no reliable evidence of the existence of legal necessity, such evidence cannot be of any avail to the defendants, unless, it, by itself, be sufficient to establish legal necessity.

For the foregoing reasons I think this appeal ought to be dismissed with costs.

This judgment governs appeals from appellate decrees Nos. 2280, 2281 and 2282 of 1906.

A. T. M.

Appeals dismissed.

(1) (1861) 8 M. I. A. 529 at p. 551; 2 W. R. P. C. 61.

(2) (1869) 13 M. I. A. 209 at 228.

Before Mr Justice Brett and Mr. Justice Chitty.

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January, 7, 8, 9,
March, 3.

BHABESWAR SINGH AND OTHERS.*

Babooana grant of ancestral property—Grantee's estate, nature of—Custom—Burden of proof—Partition—Babooana grant, nature of.

Per curiam—Landed property acquired by a grand-father and distributed among his sons does not by such gift become their self-acquired property so as to enable them to dispose of it to the prejudice of the grandsons.

Muddun Gopal Thakur v. Ram Baksh Pandey (1), followed.

A *Babooana* grant of ancestral property by the owner of an impartible estate to ensure for the benefit not only of a junior member of the family but of his male descendants in the direct line does not lose its ancestral character by the grant. It does not become self-acquired property in the hands of the grantee or his direct male descendants. Hence the other members of the family have the rights in it which they can claim under the *Mitakshara* law, that is, the right to restrain alienation except in cases of legal necessity and

* Appeal from Original Decree No. 267 of 1907, against the decree of H. E. Ransom Esq., District Judge of Durbhanga, dated the 27th May 1907.

(1) (1855) 6 M. I. A. 165.

the right to claim partition and the original grantee has no power to dispose of the property by Will.

Ram Chunder Marwari v. Madeswar Singh (1), followed

The custom which operates in the case of the Raj itself does not apply to a *Babooana* grant without the requisite proof which is necessary in such cases. The burden of proof lies upon the person seeking to establish the particular custom and to take this out of the ordinary category of Hindu family property.

Per Brett J.—A *Babooana* grant is made to a junior member of the family and to his descendants in the male line for their maintenance. The grant is not of a portion of landed property to pay off a certain fixed sum of money which the grantee is entitled to claim on account of his maintenance from the Raja, but it is a grant for the maintenance of the grantee and his male descendants so long as there are any.

Appeal by the Defendant.

Suit for partition.

The facts and argument appear sufficiently from the judgment.

Messrs Jackson and Hill and Babus Lal Mohan Doss and Baldeo Narayan Singh for Appellant.

Mr. Garth, Dr. Rash Behary Ghose and Babus Umakali Mukerji, Golap Chunder Sarkar, Akhoy Kumar Banerji, Laksmi Narain Singh and Chandra Sekhur Prosad Singh for the Respondents.

C. A. V.

The judgments of the Court were as follows :—

Brett J.—I agree entirely with the conclusions arrived at by my learned brother in his judgment and with his reasons and I hold that the appeal must be dismissed with costs. I only desire to add a few supplementary remarks.

The line of argument which has been taken by the learned counsel for the appellant has been that property which forms the subject of a *babooana* grant is not the property of the joint family, that it is alienable at the will of the grantee, and that the incidents which attach to the Raj must be held to apply to the property which forms the subject of the *babooana* grant to the extent that as in the case of the Raj the junior members of the family have no right to claim partition or to retain alienation because they have no rights of ownership, so in the case of a *babooana* grant the junior members of the grantee's family have no such rights.

In other words his argument amounts to this that under a *babooana* grant the property passes to the original grantee

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absolutely and he has the right to alienate the whole or any part of it subject to no restraint from the junior members of his branch of the family who too have no right to claim partition, and from this it follows that the grantee has full power to dispose of the property by will.

The argument cannot in my opinion be sustained either in principle or by authority.

• A *babooana* grant is made to a junior member of the family and to his descendants in the male line for their maintenance, and and if the line of argument of the learned counsel were followed to its logical conclusion the result would be that the object for which the grants are made might be defeated by the first grantee who could dispose of the whole of the property at once and so defeat the right of all his descendants in the male line.

The argument of the learned counsel that the whole or any part of the property covered by the grant is alienable by the first grantee is based on the contention that the property passes to him as an absolute gift and by such transfer ceases to be ancestral and becomes the self-acquired property of the grantee only. In my opinion the contention is not sound in principle. Admittedly the property which forms the subject of a *babooana* grant is ancestral in the hands of the grantor, and applying the principle laid down in the case of *Muddun Gopal Thakoor v. Ram Buksh Pandey* (1) the property would not lose its original character by reason of the grant nor in the present case would it lose it under the terms of the grant. The grant is made for the maintenance of the grantee, as a junior member of the family, and his descendants in the male line subject to the restriction that on failure of male descendants it reverts to the Raj.

Now the right of the junior members of the family in the case of a Raj like the Darbhunga Raj to *babooana* grants for maintenance undoubtedly arises out of the fact that they are members of the joint family who, were it not for the special customs prevailing in the case of the Raj, would have the same rights as members of a joint Hindu family governed by the Mitakshara law ordinarily have under that law and those rights include a right to a share in the ancestral family property. In consequence of the incidents of primogeniture and impartibility which by immemorial custom attach to the Raj they lose their right, to enjoy a share of the family property, but as a compensation for that loss they are entitled to receive from the Raja

certain portions of the landed property of the Raj as *babooana* grants for the maintenance of themselves and their descendants in the male line. The grant is not of a portion of landed property to pay off a certain fixed sum of money which the grantee is entitled to claim on account of his maintenance from the Raja, but it is a grant for the maintenance of the grantee and his male descendants so long as there are any. The fact that the Raja continues to be registered as proprietor in the official registers, on which the learned counsel relies for other purposes, certainly supports the view that the property does not lose its original and ancestral character by reason of the grant or become the self-acquired property of the grantee alone. It is admitted that on the death of the original grantee the property passes to his heirs as ancestral property with all the incidents attaching to such property under the Mitakshara law. The grant is made under the *kulachar* or family custom for the maintenance of male members of a branch of the family so long as there may be any, and not merely for the maintenance of the individual in whose name in the first instance the grant is made. There is in my opinion no reason which can in principle be supported for holding that the property which is the subject of the grant ceases to be ancestral only for the period that the first grantee lives so as to enable him to defeat the whole object of the grant.

Nor can the argument be supported by authority. In the case of *Baboo Gunesh Dutt Singh v. Maharaja Moheshur Singh and others* (1) their Lordships of the Privy Council do not lay down, as the learned counsel suggests, that the incidents which attach to the Raj must be held to attach to the grant because they hold that "the property is never separated from the Zemin-dary at all", in fact that opinion is expressed to distinguish *Babooana* grants from absolute grants. The learned counsel admits that the right of primogeniture and impartibility which are incidents of the Raj itself cannot apply to *Babooana* grants, and it is not clear on what he bases his contention that because the right of alienation is not restricted in the case of the holder of the Raj therefore the holder of a *Babooana* grant has the same unrestricted right.

The grant in the case of *Raja Nursing Deb v. Roy Koylashnath and others* (2), on which the learned counsel relies, was not a *Babooana* grant at all. It was a grant of landed property made in discharge of a decree obtained for a specific sum of

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(1) (1855) 6 M. I. A. 165 (See page 197). (2) (1862) 9 M. I. A. 55.

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money as maintenance. That case has therefore no application to the present.

Nor do the cases of *Sartraj Kuari v. Deoraj Kuari* (1) and of *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards and Venkata Kumari Mahipati Surya Rao* (2) assist his argument. They simply lay down what are the incidents which attach to the Raj itself, which in this case are not disputed.

In the case of *Rameswar Singh v. Fibender Singh* (3), it is not laid down as the learned counsel suggests that the original grantee of a *babooana* grant has the right to alienate the whole or any part of the property covered by the grant subject to no restraint by other persons interested in the grant, but that the right to alienate may be exercised for sufficient and good cause. And in the case of *Ram Chunder Marwari v. Mudeshwar Singh* (4), it has been laid down that a *babooana* grant of ancestral property by the owner of an impartible estate to enure for the benefit not only of a junior member of the family but of his male descendants in the direct line does not lose its ancestral character by the grant. It does not become self-acquired property in the hands of the grantee or his direct male descendants. The latter case is direct authority against the contention of the learned counsel and though we have been informed that the case is under appeal to the Privy Council, I see no reason to dissent from it. In fact I am in agreement with the view taken by the learned judges in that case.

No authorities have been quoted to support the contention that the property covered by a *babooana* grant becomes self-acquired only so long as it is in the hands of the original grantee and in my opinion the contention is unsound.

It follows then that the property being ancestral, the other members of the family have the rights in it which they can claim under the Mitakshara law, that is the right to restrain alienation except in cases of legal necessity and the right to claim partition: and the original grantee has no power to dispose of the property by will.

The plaintiffs are therefore entitled to the relief claimed and the appeal must be dismissed with costs.

Chitty J.—This is an appeal from a decree of the District Judge of Darbhanga passed in favour of the plaintiff and ordering

(1) (1888) L. R. 15 I. A. 51 ; I. L. R. 10 All. 272.

(2) (1898) L. R. 26 I. A. 82 ; I. L. R. 22 Mad. 383.

(3) (1903) I. L. R. 32 Calc. 683.

(4) (1906) I. L. R. 33 Calc. 1158.

a partition of the property in suit. The plaintiff Babu Bhabeswar Singh instituted the suit against his brother Babu Laliteswar Singh and his five nephews. His claim was (1) for a declaration that the alleged will of Babu Guneswar Singh (father of plaintiff and defendant No. 1, and grand-father of the other defendants) dated 17th March 1903, was invalid and ineffectual against the property in suit ; (2) that it be determined that the property was joint and the plaintiff's share therein was one fourth and (3) that the said property be partitioned. He further put forward a claim as against defendant No. 1, for an account, for a receiver, and for discovery. The relationship of the parties and their position in the family of the Maharaja of Darbhanga appears from the following Genealogical table :—

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There is no question that the parties are members of a Hindu family governed, save for any special custom, by the Mitakshara Law. The property in dispute is the Pergana Padri and any accretions of it which there may be. This Pergana was granted by a former Maharaja Rudra Singh to his second son Guneswar according to the *kulachar* or custom of the Durbhanga family, as *babooana*, that is to say, for the maintenance of himself and his descendants in the male line, with the condition that on failure of male heirs in such line the property should

revert to the grant appears to have been made before any of Guneswar's sons were born. The grant was not by Sanad, but it is referred to in a Sanad, dated 7th Phalgun 1257 and granted by the Maharajah Rudra Singh in favour of his eldest son and successor Maharaja Maheshwar Singh. Guneswar enjoyed the property during his life time, and dealt with it in various ways, to which we shall hereafter refer. He had four sons to each of whom he appears to have made an allowance. Two predeceased him and at his death defendant No. 1 was the elder of the two, then surviving. At the close of his life Guneswar was removed to Benares, where he was under the care of defendant No. 1. He is said to have executed on 17th March 1905 a will of which he appointed defendant No. 1 executor trustee. The effect of the will was to tie up the whole property, (subject to an annual allowance of Rs. 11,000 to each of his sons or their respective descendants) for an indefinite period after the testator's death for the payment of the debts incurred by him during his life time. The will further provided for the maintenance and upkeep of the family idols, dedicating as debutter certain specified properties. Finally

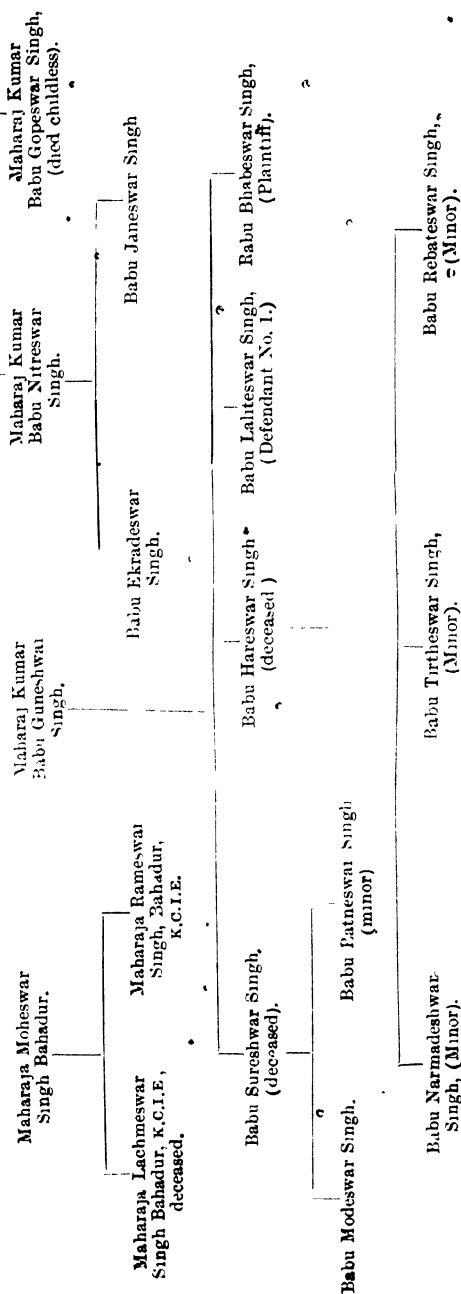
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by the will after the satisfaction of all the debts due to creditors and also the settlement of all disputes and suits relating to the estate, the residue of the estate was to be partitioned among the four branches of the family. The *factum* of this will was disputed and defendant No. 1's application for probate was contested. The Court of first instance refused probate, but that decision was reversed on appeal to this Court. A further appeal to His Majesty in Council has been lodged, but for the purposes of the present case, the will must be regarded as having been executed, and as being the last will and testament of Babu Guneshwar Singh. The appellant in his written statement contended that the will was valid and operative, that Babu Guneshwar Singh was competent to execute such a will, and that a custom of executing such wills prevailed in the Durbhanga family. He further submitted that even if the said will was not valid, in view of the nature of the tenure held in the said Pergana Padri and the incidents thereof the same was not liable to partition, and that neither plaintiff nor any of the defendants could claim such partition.

Eleven issues were framed by the learned Subordinate Judge before whom the suit originally came. They are set out in the judgment now under appeal. The point for our determination may however be stated broadly thus:—was the *babooana* grant in the hands of Babu Guneshwar Singh ancestral or self-acquired property? If the former, his interest therein ceased at death and he could make no valid testamentary disposition with regard to it. If the latter, he could dispose of it as he pleased.

The appellant's counsel argued on the following lines: (1) there was no partition (he said) of the properties, the subject of the *babooana* grant, from the properties of the parent Raj. the inability of a father to alienate arose from the interest of his sons acquired at birth. the property in paternal and ancestral estate acquired by birth under Mitakshara Law was so connected with the right to partition, that it did not exist where there was no such right. therefore (he argued) there was no proprietary right in this estate on the part of the sons. (2) That the eldest son where the Mitakshara Law prevails and there is a custom of primogeniture, does not become a co-sharer with his father in the estate: therefore to exclude the general operation of law as to an estate being alienable a custom that it is inalienable must be proved. (3) The testator, if he could alienate by gift might do it by will. (4) The right to have a *babooana* allowance does not create a community of interest which would be a restraint on an

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alienation. (5) To prevent alienation there must be a co-ownership in the son or sons. (6) The burden of proof is upon those who seek to restrain alienation and (7) where there is no right on the part of the sons to partition, there is no right to the estate.

The fallacy of this argument appears to me to lie in the assumption that the peculiar incidents attaching to the Raj itself must necessarily attach also to the property granted out of it as *babooana*. The attribute of impartibility and the custom of succession by primogeniture, which undoubtedly obtain with regard to the Raj itself, have arisen for a particular purpose, namely, to keep the Raj intact from generation to generation in the direct male line. This custom is well recognised, and has been accepted by the Courts. But for it, however, the family would be subject to the ordinary Mitakshara Law. Now the peculiar incidents of the tenure of the Raj itself do not, it is conceded, apply in their entirety to property granted to the younger members of the family who are styled Babus. The grant is one for maintenance and is irrevocable only so long as there are in existence direct male descendants of the grantee; but on failure of them it reverts to the Raj. It is not subject to the rule of primogeniture; but descends to all the male members of the grantee's line according to the ordinary rules of inheritance. The custom therefore which operates in the case of the Raj itself cannot be held to apply to a *babooana* grant without the requisite proof which is necessary in such cases. The burden of proof would lie upon the person seeking to establish the particular custom, and to take the case out of the ordinary category of Hindu family property, that is to say, in this case upon the appellant.

A considerable body of evidence has been adduced upon the point but we do not consider it necessary to examine it in minute detail.

Much reliance was placed by the appellant's counsel on the fact that Maharaj Kumar Nitreswar Singh made a will. Babu Nitreswar Singh was a son of the Maharaja Rudra Singh and had obtained Pergana Nisankpur Khudha as his *babooana* grant. He left 2 infant sons and several daughters. He certainly on 31st July 1883, made a will whereof he appointed the late Maharaja Sir Rameswar Singh Executor and the Maharaja obtained probate of it. The value of the circumstance as tending to establish a custom is however not great. By the will the testator desired that provision should be made for the marriages of his then unmarried daughters, and the guardianship of his sons, but

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present explanation by the appellant must be taken against him. On the evidence as a whole I entirely agree with the learned District Judge that no family custom has been proved, which would authorise an alienation of this property by will.

It was argued by appellant's counsel that this case was practically concluded by the decision of the Judicial Committee of the Privy Council, in the case of *Ram Sartaj Kuari v. Ram Deoraj Kuari* (1); but that case, as also the others cited and relied upon by him, dealt with the tenure of the impartible Raj itself. They did not touch the question of the character of *babooana* property, which as I have pointed out is subject to different considerations. The other cases were *Baboo Gunesh Dutt Singh v. Maharaja Moheshur Singh* (2), and *Sri Raja Rao Venkata v. Court of Wards* (3).

The case of *Muddun Gopal Thakoor v. Ram Buksh Pandey* (4), is an authority for the proposition that landed property acquired by a grand-father and distributed among his sons does not by such gift become their self-acquired property so as to enable them to dispose of it to the prejudice of the grandsons. So here the grant of the Pargana Padri to Babu Guneshwar Singh as *babooana* did not make it his self-acquired property. The question of the nature of *babooana* grants in the Durbhanga family has been before this Court recently in two cases, and those decisions are adverse to the appellant's contentions. Those cases are *Rameswar Singh v. Fibender Singh* (5), and *Ram Chandra Marwari v. Mudeshwar Singh* (6). The question in each case was, as to creditor's rights, the contention being that *babooana* property was inalienable and so not available for the satisfaction of debts. In the latter case the learned Judges say:—"The grant was made by the owner of the impartible Raj estate to enure for the benefit not only of Guneshwar Singh but of his direct male line. It was ancestral property in the hand of the Rajah and did not lose its character by the transfer." With that expression of opinion I entirely agree. It is said that an appeal is pending to His Majesty in Council against that decision, but that cannot affect the decision in the present case. If, as I think, this property in the hands of Guneshwar Singh was ancestral property, his sons acquired an interest in it at their birth. He

(1) (1884) 15 L. A. 51, I. L. R. 10 All 272.

(2) (1855) 6 M. I. A. 165.

(4) (1863) 6 W. R. 71

(3) (1898) L. R. 26 I. A. 83

(5) (1905) I. L. R. 32 Calc. 683.

(6) (1906) I. L. R. 33 Calc. 1158.

had no interest in it of which he could dispose by will, and the property is now subject to the ordinary incident of ancestral property namely partition between the present owners. The appellant's contentions are somewhat inconsistent, for he is constrained to admit (having regard to the provisions of the will itself) that there must ultimately be a partition among the descendants of Babu Guneshwar Singh. I am of opinion that learned District Judge's decision is correct and that plaintiff is entitled to an immediate partition as well as to the other reliefs which he claims.

The appeal is accordingly dismissed with costs.

A. I. M.

Appeal dismissed.

*Before the Hon'ble Robert Fulton Rampini, Acting Chief Justice
and Mr Justice Ryves.*

RAJA PROMADA NATH ROY BAHADUR

v

KINOO•MOLLAH, *alias* KALA MIA AND OTHERS.*

*Undue influence—The Indian Contract Act, Amendment Act (VI of 1899)
Sec. 2—Presumption—Landlord and tenant—Dominating the will—
Kabuliyat unfairly obtained—onus—Executants—Suit to set aside by one of
the executants—Fraud—Pleadings—Full particulars.*

There is no broad or general presumption that a landlord, even an influential one, can so dominate the will of his tenants as to induce them to make unconsonable bargain in his favour.

The onus of proving that a *kabuliyat* was unfairly obtained lies on the person who alleges it.

Where a *kabuliyat* was executed by several persons it can not be set aside as a whole, when all the executants did not question it.

Per Ryces J.—It is incumbent on a party, be he plaintiff or defendant, who seeks to avoid a contract on the ground of fraud or undue influence, to give in his pleadings full particulars of the circumstances on which he relies as the basis of his plea. It is not enough to boldly assert that, fraud or the like vitiated the contract.

Ganga Narain Gupta v. Tulak Ram Chowdhuri (1), referred to.

Appeals by the Plaintiff in S. A. 2001 and by the Defendant in S. A. 2125.

* Appeals from Appellate Decrees Nos 2001 and 2125 of 1906, against the decrees of K. N. Roy Esq., District Judge of Jessore, dated the 30th July 1906, reversing that of Babu S. C. Gangooly, Officiating Subordinate Judge. 2nd Court of Jessore, dated the 1st February 1906.

(1) (1888) 1 L. R. 15 Calc. 533 (P. C.).

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Suits for arrears of rent in S. A. 2001 and for a declaration that a *kabulyat* is not binding on the plaintiff in S. A. 2125.

The facts of the case and argument appear sufficiently from the judgments.

Dr. Rash Behary Ghose and Babu Satish Chunder Ghose for the Appellant.

Babus Nil Madhub Bose, Shib Chunder Palit, Surendra Chander Sen and Anilendra Nath Roy Chowdhury for the Respondents.

C. A. V.

The judgments of the Court were as follows :—

June, 24.

Rampini C. J.—These two appeals Nos. 2001 and 2125 of 1906 are appeals against the decision of Mr. K. N. Roy, District Judge of Jessore, dated the 30th July 1906, in which he disposed of two appeals in two analogous suits. The first suit, to which appeal No. 2001 relates, was a suit brought by Raja Promada Nath Roy for arrears of rent due under a *kabulyat*, dated the 29th Kartic 1302, executed in his favour by the 6 defendants, who are the sons and widows of one Farajuddin Mollah deceased. The other appeal No. 2125 relates to a suit brought by Abdul Rashid, one of the minor sons of Farajuddin Mollah, through his next friend Basir Mollah for a declaration that the *kabulyat* of 1302 is not binding on him, that it was extorted by false intimidation, force, fraud and collusion, and that a decree obtained by the Raja Promada Nath Roy in 1901 in the Court of the Munsiff of Narail on the basis of this *kabulyat* is wholly void. To this suit, the minor plaintiff Abdul Rashid made the Raja Promada Nath Roy, as well as the widows and other sons of his father Farajuddin Mollah parties defendant. The Subordinate Judge decreed the rent suit and dismissed the suit relating to the *kabulyat*. The District Judge has reversed his decision in both cases. He has held that the *kabulyat* of 1302 was obtained by coercion and fraud. He has therefore set it aside, declared the rent decree of 1901 void and has dismissed Raja Promada Nath Roy's suit for rent.

Raja Promada Nath Roy who was plaintiff in the suit for arrears of rent, and defendant No. 1 in the suit for the cancellation of the *Kabulyat* and previous rent decree, now appeals. His grounds of appeal are (1) that the District Judge could not set aside the previous decree for rent : (2) that in any case he could not set it aside except in favour of the plaintiff Abdul Rashid : (3) that in the suit for the cancellation of the *kabulyat*, the

plaintiff should not have been allowed to set up inconsistent pleas of coercion and collusion, fraud and undue influence (4) that in deciding this suit the District Judge has misplaced the burden of proof: (5) that he has not considered the effect of the previous rent decree: (6) that the facts found are not sufficient to sustain the findings of fraud and undue influence: (7) that the District Judge has misconstrued the terms of the lease: (8) that he is wrong in finding that the mother of Abdul Rashid had no authority to execute the lease on behalf of her minor sons and (9) that the whole *kabulyat* cannot be set aside at the instance of the plaintiff Abdul Rashid.

A preliminary objection has been taken to the hearing of the appeals Nos. 2001 and 2125 on the ground that the appeal No. 2001 is barred by limitation as against the respondents Nos. 1, 4 and 6, and appeal No. 2125 is barred as against the respondents Nos. 2 to 7, as the appeals were filed on the 12th November 1906, and these respondents were not added till the 8th July. I may deal with this preliminary objection at once. These respondents were obviously not added owing to a mistake of the clerk of the appellants' pleader Babu Satis Chunder Ghose. I would therefore over-rule the objection and admit the appeals against these respondents.

I will first dispose of the appeal in the suit for the cancellation of the *kabulyat* or lease and the avoidance of the previous rent decree. The District Judge finds that under section 2 of Act II of 1899 the landlord Raja Promoda Nath Roy was in a position to dominate the will of the executants to the deed, who were his tenants, and hence that the burden of proving that such a contract as was made by the *kabulyat* was not induced by undue influence lay on him. He then goes on to find that the terms of the *Kabulyat* are illegal and extortionate, that it was obtained by undue influence, and is therefore inoperative. He winds up by setting it aside not only in favour of the plaintiff, but in favour of all the other executants, who sought no relief from it, and who did not appeal against the Subordinate Judge's decree dismissing the suit for its cancellation. It would appear to me that in all these findings the learned District Judge is in error. In the first place, he should not have set aside the *Kabulyat* in favour of the defendants who did not seek for relief against it and who did not appeal to him. In the second place, the terms of the lease do not appear to me to be extortionate and illegal. Farajuddin, the father of the plaintiff and of the

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other male executants of the lease had in 1295 executed in favour of the Land Mortgage Bank, the Raja's predecessor in title, a lease for 4 khadas 11 pakhis of land at a rental of Rs. 97-8, according to the judge, "Farajuddin died in 1297, and in 1298 the Land Mortgage Bank brought a suit for rent against his heirs, the present plaintiff and the tenant defendants (rent suit No. 23 of 1801) in respect of 17 khadas and odd by accretion and claimed increased rent. The Civil Court Amin who was deputed to make a local investigation, found the area to be 17 khadas and the Court passed a decree at Rs. 121 and odd. The appeal against this decision was dismissed on the 22nd September 1894. The defendant No. 1 Raja Promada Nath Roy Bahadur, who purchased the right and interest of the Land Mortgage Bank then obtained the *kabulyat* in question from the heirs of Farajuddin in respect of 17 khadas and 3 pakhis of land at the annual rent of Rs. 447 with a *hajut* of Rs. 103."

Now, the Judge says the rent was pushed up from the original rent of Rs. 121 and odd per year to Rs. 550. But this would seem not to be necessarily an enhancement, but was due to increased rent being payable for additional land added to the subject of the lease. The original rent was Rs. 97-8 for 4 khadas 11 pakhis, subject to a *hajut* of about Rs. 30. The Land Mortgage Bank got a decree for Rs. 121, being unable to prove the increase in the area alleged by it. Then, the land was measured and found to be 17 khadas; so the rent was increased. But there is nothing to show that the increased rent of Rs. 550, with a *hajut* of Rs. 103, was an excessive rent or in any way contravened the provisions of the rent law. Then, the Judge has said "While the first *kabulyat* conferred a permanent tenure with a right of transfer to Farajuddin, the Raja's *kabulyat* confers on his heirs only a right of occupancy without a right of transfer, *secondly*, while in the first, full rate of Rs. 2 per pakhi was to be charged, when the land would be fit for all kinds of crop and Re. 1-10 was to be charged, when it is fit only for cultivation of some crop, in the Raja's *kabulyat* these rates are to be charged whenever the land is measured. There are many other conditions inserted in the Raja's *kabulyat*, which are either illegal or extortionate. It is not likely that if all these terms had been clearly explained to the executants, and a free will left to them that they would execute the *kabulyat*." But the first *kabulyat* did not make the tenure permanent or transferable. It only made it enjoyable from generation to generation *i. e.* hereditary. It could not make

it permanent, and therefore transferable for the rent was always enhanceable and the tenants subject to eviction.

I am further of opinion that the *onus* of proof has been misplaced. It seems to me most unreasonable to say, as the Judge has said, that a landlord is in a position to dominate the will of the tenant. If this were so, then the *onus* would always be on the landlord to show that every lease executed in his favour was not extorted by means of force or undue influence. It may be doubted too, if there were sufficient grounds for concluding that the widows of Farajuddin were in such a state of fear, ignorance and helplessness at the time of the execution of the lease as not to know what they were doing. But whether or not they were in such a state, this can only apply to the execution of the lease by Abejunnissa on behalf of Abdul Rashid. The other executants were either adults, or do not sue to set it aside. It is true that the finding of the Judge that the execution of the lease by Abdul Rashid's mother is void owing to coercion is a finding of fact, with which we can not ordinarily interfere in second appeal, but I consider that this finding is vitiated by the misplacement of the burden of proof which in my opinion has been erroneously placed on the defendant the Raja Promada Nath Roy. On the whole, then I consider the lease to be binding on all the executants except Abdul Rashid, who alone sued to have it set aside. As regards the others, the contract appears to me to be a joint and several one, binding the executants of it who are in occupation of the land. It would be unreasonable to allow the executants to escape from their liability to pay rent under the lease, while they continue to hold and enjoy the profits of the land.

The lease must therefore I think be held to bind all but Abdul Rashid. As for the finding of fact in the case of Abdul Rashid, as the finding was wrongly arrived at, the case should I think go back to the lower appellate Court for a fresh finding on this issue, after placing the *onus* of proof on the plaintiff.

As to the authority of the mother of Abdul Rashid to execute the *kahulyat* for him, this need not be determined until it is decided whether the execution of the lease was obtained by coercion or fraud. But on this point, I would call the attention of the lower appellate Court to the cases of *Watson & Co., v. Sham Lal Mitter* (1), *Mafazzal Hossain v. Basid Sheikh* (2). In

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(1) (1887) 6 L. R. 14 I. A. 178 ; I. L. R. 15 Calc 8

(2) (1906) 4 C. L. J. 485.

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the lease itself it is said that the lease is being executed for the benefit of the executants. The District Judge is also in my opinion in error in his views with regard to the previous decree of 1901 for it is clear that this decree should not, as the Judge says, fare the same fate as the *kabulyat*. There was no question of fraud or coercion set up or proved in the suit in which this decree was obtained. No fraud was practised on the Court. Whatever the decision of the Judge as to the validity of the *kabulyat*, so far as Abdul Rashid is concerned, this decree of 1901 must stand good and cannot be declared void, even as against Abdul Rashid. It is to be noted that the Subordinate Judge finds rent under the *kabulyat* was previously paid by the defendants. He says "It is in evidence that rent was paid by Faraj's heirs in terms of the *kabulyat*, Exhibit A, and the rent decrees (both original and appellate) have been admittedly satisfied. Plaintiff's mother, step-mother (defendant No. 6) and step-brothers paid rent, defendant No. 1 in accordance with Exhibit A for a number of years and defendant No. 1 got rent down to the second quarter of 1307 at the full Jama mentioned in Exhibit A. It is too late for plaintiff and his co-sharers to have the decrees cancelled."

I now turn to the case of the rent suit to which appeal No. 2001 relates.

The grounds of appeal urged in this case are that as the defendants Nos. 1, 4 and 6 did not appeal to the District Judge against the decree of the 1st Court, the decree of that Court should not have been reversed as against them, and the contract being joint and several one, and as Abdul Rashid is the only executant who sues to set it aside, all but Abdul Rashid must be bound by it. This would appear to be the case. As against Abdul Rashid whether he is liable for the rent sued for, or not, depends whether he is bound by the *kabulyat* or not, and must abide by the result of the finding for which that suit has been remanded.

I would therefore decree both appeals against all respondents except Abdul Rashid with costs in proportion. As regards Abdul Rashid, in the suit to which appeal No. 2125 relates the case is remanded for determination of the question whether he is bound by the lease or not. Costs in proportion to follow the result.

The rent suit, to which appeal No. 2001 relates is similarly remanded so far as Abdul Rashid is concerned to be disposed of in accordance with the determination of the question of Abdul Rashid's liability under the lease. Costs in proportion to follow the result.

The history of this litigation is as follows :

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Ryves J.—Second appeal No. 2001 of 1906 arises out of a suit brought by Raja Promada Nath Roy as zemindar against 6 persons of whom one is Abdul Rashid Mollah, a minor, on the allegation that these defendants were his tenants of the land in suit under a *kabulyat* dated the 29th Kartic 1302 and, at the date of the suit, owed him Rs. 1800.11-3 ps. This suit was numbered 15 of 1904.

Second appeal No. 2125 arises out of a suit brought by Abdul Rashid Mollah, the minor above-mentioned, through his guardian *ad litem*, against the Rajah, defendant No. 1, and 6 other persons, his co-sharers, namely, his 3 brothers, his mother, his father's second widow, and the widow of a deceased co-sharer as proforma defendants, in which he sought to set aside the *kabulyat* of the 29th Kartic 1302 and also to set aside a decree for arrears of rent which the Rajah, defendant No. 1, had obtained on the footing of that *kabulyat* in suit No. 19 of 1901 and which had been confirmed by the appellate Court and had been duly executed. This suit was numbered 339 of 1904.

Both suits were filed in the Court of the Subordinate Judge of Jessore and were tried together. The Court of first instance decreed the suit No. 15 and dismissed the suit No. 339. All the defendants with the exception of defendants Nos. 1, 4 and 6 in suit No. 15 appealed to the District Judge, but, in suit No. 339, Abdul Rashid Mollah alone appealed. Both appeals were decided by one judgment and both were decreed. From these decrees, two appeals have been preferred to this Court in both of which the Rajah is the appellant.

The facts are as follows.—Ferajuddin Mollah held a lease of some 4 khadas of *chur* land from the Land Mortgage Bank on a *kabulyat* executed by him in Assar 1295. He died in 1297 and was succeeded by the respondents as his heirs. The Land Mortgage Bank, in 1298, *i.e.*, 1891, brought a suit against these heirs of Ferajuddin for rent in respect of 17 khadas odd, added, it was alleged, by accretion and claimed increased rent but, being unable to prove the increase in the area, as alleged, obtained a decree for Rs. 121. The Bank appealed. Pending the appeal, the Rajah acquired the Bank's right and title in the property and was substituted in the appeal as an appellant. The appeal was dismissed. Subsequently, the lands in the occupation of the respondents were measured and found to be 17 khadas odd, on the basis that this was the correct area, the *kabulyat* in 1302, was executed by the two adult sons of Farajuddin, his widows on

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their own behalf and as guardians of the minor sons of Farajuddin of whom Abdul Rashid Mollah was one. It appears that the respondents for some years paid rent to the Rajah according to the *kabulyat* as stated above. The Rajah had also successfully sued for rent in terms of the *kabulyat* and had executed his decree against all the respondents.

To the hearing of these appeals, a preliminary objection was raised on the ground that appeal No. 2001 is barred by limitation as against the respondents Nos. 1, 4 and 6 and appeal No. 2125 is similarly barred against respondents Nos. 2 to 7 inasmuch as their names were not brought on the record of the appeals which were filed on the 12th November 1906 until the 8th of July 1907. We, however, are satisfied by the affidavits filed on behalf of the appellant that the omission to enter the names of these respondents was due to a clerical error or a mistake of the clerk of the learned pleader for the appellant, and was not intentional. We, therefore, overruled the objection and allowed the appeals to be heard against all the respondents.

It will be convenient to deal, first, with appeal No. 2125. The plaintiff in the suit to which this appeal relates stated in his plaint that the Rajah (defendant No. 1, appellant) by his "mofussil agents began to cause loss to the plaintiff and his mother in various ways and then having brought this plaintiff's mother and other co-sharers to their side by means of false intimidation (*sic*), force, fraud and improper inducements and having colluded and joined with the defendants Nos. 2, 3, 5 and 6 got them to execute a *kabulyat* on the 29th of Kartic 1302 in favour of defendant No. 1." In my opinion, the plaint in this form should not have been received by the Court of first instance. Not only are some of these allegations inconsistent with each other but no particulars are set forth on which any of these allegations which are really inferences of law could be based. It has repeatedly been held that it is incumbent on a party, be he plaintiff or defendant, who seeks to avoid a contract on the ground of fraud or undue influence, to give in his pleadings full particulars of the circumstances on which he relies as the basis of his plea. It is not enough to boldly assert that fraud or the like vitiated the contract. If authority is required for this proposition, see *Ganga Narain Gupta v. Tilak Ram Chowdhury* (1). The pleadings in this case were most unfair. The defendant No. 1 had no knowledge of the case he had to meet. All he could do

under the circumstances was to deny, as boldly, the truth of the plaintiff's allegations. The Court, however, on these pleadings, fixed the issue • "whether the *kabulyat* was taken by coercion and misrepresentation by the officers of defendant No 1?" Strictly speaking, that was not the proper form in which to frame the issue. The Court should have ascertained the circumstances alleged by the plaintiff on which he relied showing coercion and misrepresentation and then found whether those circumstances had been proved and, if proved, whether in law they amounted to coercion and misrepresentation such as would justify the setting aside of the contract. The Court of first instance, however, took the evidence tendered by the parties and, although it laid the *onus* (as I think wrongly) of proving that the *kabulyat* was not obtained by coercion or misrepresentation on the defendant No. 1, it held that he had discharged it and dismissed the suit. On appeal, the lower Court seems to have approached the question in this way. The learned Judge says the defendant No. 1 is an influential landlord [though apparently an absentee landlord as he lives in the District of Rajshahye] and the plaintiff is a tenant, therefore the defendant was in a position to dominate the will of the tenants and he lays down the law as follows: Under section 2 of Act VI of 1899, the defendant No. 1 being the landlord and the plaintiff and the other defendants being his tenants, he was in a position to dominate the will of the others and the burden of proving that such a contract as was made by the *kabulyat* was not induced by undue influence lay on him. Here, I think, he has gone much too far. There cannot be any such broad or general presumption that a landlord, even an influential one, can so dominate the will of his tenants as to induce them to make unconscionable bargain in his favour." The learned Judge has, in arriving at the conclusion that the contract of lease evidenced by the *kabulyat* was unfair, relied mainly on the terms of the *kabulyat* itself. First he says that the rent has been greatly enhanced. He says "the rent was pushed up from the original rent of Rs. 121 odd per year to Rs. ₹50." The learned Judge, however, has omitted to notice the fact mentioned in the opening of this judgment that the original lease covered an area of only some 4 kfadās at a rental of Rs. 97-8, and the reason why the Land Mortgage Bank obtained a decree for Rs. 121 was because they failed to prove in their suit that the area held by the respondents had been increased by accretion. When the land was measured at the

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time of the execution of this *kabulyat*, it was found to be over 17 khadas in area. Consequently it does not follow that the increased rent of Rs. 550 was an unfair enhancement, seeing that the area of the land had been increased four-fold.

The next circumstance on which the learned Judge relies as showing unfairness is expressed in the following words: "while the first *kabulyat* conferred a permanent tenure with a right of transfer to Farajuddin, the Rajah's *kabulyat* confers on his heirs only a right of occupancy without a right of transfer." In my opinion, the learned Judge has misconstrued the first *kabulyat*, as pointed out by the learned Chief Justice. It did not make the tenure permanent or transferable. It only made it enjoyable from generation to generation, that is, hereditary. It did not and could not make it permanent and therefore transferable, for the rent was always enhanceable and the tenants were subject to eviction. As I have said above, the learned Judge, in coming to the finding of fact that the *kabulyat* had been obtained by the Rajah unfairly, has relied mainly on the inferences he has drawn from the terms of the two *kabulyats*. It is open to us to construe those documents ourselves to see whether they could bear the interpretations put on them by the learned Judge. As pointed out before I do not think they do. When, then, the main foundation of this finding proves on examination to be non-existent, it seems to me the finding itself cannot stand. If it goes, there does not seem to be anything else on the record to show that the bargain was so 'unconscionable' as to raise the presumption that the landlord has abused his position as landlord to dominate the tenants to his own unfair advantage so as to place the burden of proving the fairness of the contract on him. Whether there is any other evidence, apart from the terms of the *kabulyat*, upon which such a conclusion is tenable, it is for the District Judge to say. If there is not, then the *onus* of proving his case affirmatively lies on the plaintiff. I think, therefore, that the case must be remanded to the District Judge for a finding whether or not the *kabulyat* was unfairly obtained, the *onus* of proving which lies on the plaintiff. These observations cover the main contentions of the learned pleader for the appellant.

The next finding attacked is couched in the following words: "The widows were not certificated guardians of the minors as stated in the *kabulyat* and had no authority to execute a *kabulyat* in favour of the minors and change the character of the tenure." Now, Abdul Rashid Mollah alone brought the suit to set aside the

kabulyat as against him and, in my opinion, the lower Court should have limited the issue to the question whether the matter of Abdul Rashid Mollah had authority to execute the *kabulyat* on behalf of Abdul Rashid Mollah and should not have included the case of the other defendants who had not set up any such case for themselves. I think, therefore, that this issue namely, whether Abejunissa had authority to execute the *kabulyat* on behalf of the plaintiff must be remitted to the lower Court for decision and, in this connection, I would call the attention of the lower Court to the cases of *Robert Watson & Co. v. Sham Lal Mitter* (1), and *Mafazzal Hossain v. Basid Sheikh* (2).

The next point taken in this appeal is that the lower appellate Court should not have set aside the *kabulyat* and the decree as against all the respondents. Four of the executants were adults of whom two were the widows of Farajuddin. They have not attacked the *kabulyat*. In fact, as mentioned above, they have acquiesced in it and paid rent according to its terms. It does not follow, even if the *kabulyat* is held not to bind Abdul Rashid Mollah, that it does not bind the other executants who have been in occupation and enjoyment of the land. The transaction is either a joint one, as I prefer to think, or a joint and several one, as argued on behalf of the appellant. If the latter, the respondents other than Abdul Rashid Mollah are responsible for the full rent as tenants. If it is a joint tenancy and it is found that Abdul Rashid Mollah is entitled to repudiate it as against himself, the result would seem to be that the remaining respondents are jointly liable for their proportionate shares of the rent as tenants and, for the portion vacated by Abdul Rashid Mollah, they are responsible to the Rajah for his share of the rent as his agents or *quasi* trustees, so long as they are in occupation and enjoyment of the whole of the land covered by the *kabulyat*. As against all the other respondents who, it may be remarked, did not appeal to the lower appellate Court from the decree of the Subordinate Judge which dismissed Abdul Rashid Mollah's suit, this appeal must, therefore, succeed and the Rajah will be entitled to proportionate costs of this appeal from them.

It is next urged that the lower appellate Court was wrong in setting aside the rent decree as a whole, not only against Abdul Rashid Mollah but also against all the other respondents. For the

(1) (1887) 14 I. A. 178; I. L. R. 15 Calc. 8.

(2) (1906) 4 O. L. J. 485; I. L. R. 34 Calc. 36.

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reasons just given, it is clear that the lower Court should not have set aside that decree as against the other respondents and, further, I do not think it should have set aside the decree even against Abdul Rashid Mollah. In the plaint, it is alleged that the decree in question was obtained on "insufficient grounds". It is then said: "In this case the plaintiff's mother was appointed guardian on behalf of the plaintiff, but being an illiterate purdah-nashin woman with no knowledge of business matters she could not properly look after the case in the first Court. Afterwards, although against the decision of the said suit an appeal was preferred in the Judge's Court of this place, but the appellants were obliged to withdraw that appeal and not to carry on the same by reason of inducements and false hopes held out by the defendant No. 1 and his agents." It is quite clear that that case was fully litigated in the rent Court in which two of the defendants were the adult sons of Farajuddin and who were jointly interested with Abdul Rashid Mollah in resisting the claim. The appeal was withdrawn and there is no evidence on the record to substantiate the allegations of the plaintiff Abdul Rashid Mollah. There was no fraud practised on the Court. If that decree was wrong, it should have been appealed against. It has been executed and it is too late now to set it aside even as against Abdul Rashid Mollah.

To turn now to the rent suit appeal No. 2001. In that suit, all the six respondents were made defendants but only two persons filed written statements, namely, Abejunissa and Kinoo Mollah, Abejunissa pleaded that she was an illiterate purdah nashin woman and did not understand the *kabulyat* which she had executed. Kinoo Mollah pleaded that his mother Tarfunnessa Bibee had no power to execute the *kabulyat* on his behalf; that advantage was taken of her being an illiterate and purdahnasin woman; that she was misled; and finally that he does not believe that she in fact executed the *kabulyat* at all.

The first Court found all the issues against the defendants and decreed the suit against all. At these the defendants Nos. 1, 4 and 6 did not appeal against that decree. I do not think, therefore, that as against them the learned Judge could set aside the decree. As regards the others, and it must be remembered that they have acquiesced in the *kabulyat* for a large number of years and in a former suit brought against them for rent, there was no objection of the kind, now set up by them, for the first time. As Abdul Rashid Mollah alone has sued for the cancellation of the

kabulyat, I do not think even if he succeeds in establishing that, as against him, the *kabulyat* is void, that that finding can benefit the other executants of it. Whether Abdul Rasid Mollah is liable for rent under the decree must depend on the findings of the issues which we have remitted to the lower Court. As against the others, for more detailed reasons given in the earlier part of this judgment, I think the appeal should be decreed.

The result is that both appeals are decreed as against all the respondents other than Abdul Rasid Mollah with proportionate costs. As regards Abdul Rasid Mollah, both cases are remanded to the lower Court for a finding whether he is bound by the lease or not. Costs in proportion to follow the result.

A. T. M.

Appeals allowed ; cases remanded.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

TALEWAR SING AND OTHERS

v.

BHAGWAN DASS AND OTHERS.*

Civil Procedure Code (XIV of 1882), Secs. 59, 63, 138—Documents when to be filed—Second appeal—Erroneous exercise of discretion—Civil Procedure Code, Sec. 584.

It is not obligatory on the plaintiffs, unless they are called upon to do so, to produce documents which are not such as ought to have been produced in Court when the plaint was presented.

Mahbub Hossein v. Patasu Kumari (1) and Gour Hurce v. Pran Hurce (2) referred to.

It is for the Court of first instance to decide whether the documents which ought to have been mentioned in the original list, or ought to have been produced earlier, were not so produced for good and sufficient reasons.

Section 138 of the Code of Civil Procedure was enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion such as certified copies of public documents or records of judicial proceedings.

Syed Ikram Hossein v. Ram Lochan (3) and Ranchhod Hirabhai v. The Secretary of State (4) referred to.

When a subordinate Court has refused in the erroneous exercise of its discretion to receive documentary evidence which ought to have been accepted, the High Court has power to interfere under section 584 of the Civil Procedure Code.

Moni Lal v. Khiroda (5), Devi Das v. Pirjada (6) and Minakshi v. Velu (7) followed.

* Appeal from Appellate Decree No. 548 of 1906, against the decision of Babu Annada Charan Bagchi, Subordinate Judge, Gaya, dated the 18th December 1905, confirming that of Babu D. C. Majumdar, Munsiff, Gaya, dated the 19th May 1905.

(1) (1868) 1 B. L. R. 120.

(2) (1878) 21 W. R. 42

(3) (1874) 23 W. R. 29.

(4) (1896) I. L. R. 22 Bom. 173.

(5) (1893) I. L. R. 20 Calc. 740

(6) (1884) I. L. R. 8 Bom. 377.

(7) (1885) I. L. R. 8 Mad. 373.

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Appeal by the Plaintiffs.

Suit to recover possession.

The facts and arguments appear sufficiently from the judgment of the Court.

Babus Mahendra Nath Roy and Kulwant Sahay for the Appellants.

Babu Joy Gopal Ghosha for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Mookerjee J.—The subject matter of the litigation out of which this appeal arises, is an estate which was sold for arrears of Cesses, under the Public Demands Recovery Act, on the 30th September 1891. The plaintiffs allege that the effect of the sale has not been to affect their interest in the property, and that consequently they are entitled to recover possession from the auction purchaser. The purchaser resisted the claim mainly on the ground that the plaintiffs had no interest whatsoever in the property. The substantial question in controversy between the parties therefore was whether the estate was the property of the judgment-debtor Sangamlal alone or whether it was the property of a joint family of which the judgment-debtor as well as the plaintiffs were members. The Courts below have dismissed the suit on the ground that the plaintiffs have failed to prove that they formed members of a joint family with the judgment-debtor at the time when the properties were acquired.

The plaintiffs have appealed to this Court and it has been contended by their learned vakil that the decision of the Courts below is vitiated by reason of improper exclusion of important documentary evidence tendered on their behalf in the Court of first instance. The suit was commenced on the 16th September 1904 and to the plaint was attached a list of documents which the plaintiffs stated would be produced later on. The first hearing of the case took place on the 8th December 1904, on which date the issues were settled and the 24th January was fixed for hearing. It was stated before this Court on behalf of both the parties when this appeal was argued, that on that date the plaintiffs were not called upon by the Court to produce their documentary evidence. On the 22nd December following, documentary evidence was filed on behalf of the defendants. On the 6th January 1905 the plaintiffs put in a petition and filed along with it their documentary evidence; this petition explained the reasons for the delay. The order of the Court

upon the petition was that it should be filed. The case was taken up for disposal on the 19th April 1905. The hearing proceeded and on the 27th April the plaintiffs asked for permission to use the documents, most of which had been mentioned in the list annexed to the plaint and all of which had been filed in Court along with the petition of the 6th January 1905. The pleader for the defendants however took objection to the reception of the documents on the ground that they had not been filed in time and that they should be excluded under section 139 of the Civil Procedure Code. The Court of first instance gave effect to this objection. Evidence was then taken and the case disposed of on the merits. It was found, *first*, that upon the evidence on the record as it stood the plaintiffs had not been able to establish that the disputed property had been acquired at a time when they formed members of a joint family with Sangram Lal; *secondly*, that they had failed to prove that they had any share in the estate in controversy, and *thirdly*, that they had failed to prove their possession within twelve years of the suit. In this view of the matter, the suit was dismissed. The plaintiffs then appealed to the Subordinate Judge and urged their objection that their documentary evidence ought not to have been excluded. The Subordinate Judge overruled this contention and upon the evidence on the record affirmed the conclusion of the Court of first instance that the plaintiffs had failed to prove their title and possession.

The plaintiffs have now appealed to this Court and on their behalf it has been argued that their documentary evidence has been improperly excluded. In our opinion this contention is well-founded and ought to prevail. The documents which have been excluded may be divided into two classes. There are some which were mentioned in the list annexed to the plaint and there are others which were produced for the first time in Court on the 6th January 1905. As regards the first class of documents it is clear that there is no good ground for their exclusion. The learned vakil for the appellants invited our attention to the provisions of sections 59 and 63 of the Code. Section 59 provides that "if a plaintiff sues upon a document in his possession or power he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint. But if he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents

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in a list to be added or annexed to the plaint." Section 63 then lays down that "a document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not without the leave of the Court, be received in evidence on his behalf at the hearing of the suit." In the case before us the documents were not such as ought to have been produced in Court when the plaint was presented. It was therefore only necessary for the plaintiffs to enter them in the list which they annexed to the plaint. This was done. At the first hearing therefore when the issues were framed it was not obligatory on the plaintiffs to produce them unless they were called upon to do so. This is clear from the decision of this Court in the case of *Mahbub Hossem v. Patasu Kumari* (1), and *Gour Hurree Chowdhry v. Pran Hurree Laha* (2). So far therefore as the documents mentioned in the list annexed to the plaint are concerned there is no case for their exclusion. It is now stated, however, on behalf of the respondent, that when the issues were drawn up, a note was added at the foot thereof that the parties should produce their documents. If this was communicated to the plaintiffs it would be their duty to file the documents mentioned in the list annexed to the plaint. Failure to do so would not, however, necessarily lead to their exclusion, as will presently be shown.

As regards the other documents which were produced in Court for the first time on the 6th January 1905 and which had not been mentioned in the list annexed to the plaint the Court of first instance clearly had a discretion, whether to receive or to reject them. Now under section 139, Civil Procedure Code, no documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of section 138 shall be received at any subsequent stage of the proceeding unless good cause be shown to the satisfaction of the Court for the non-production thereof. No doubt the plaintiffs have brought themselves within the scope of this section, and it was for the Court of first instance to decide whether the documents which ought to have been mentioned in the original list, or ought to have been produced earlier, were not so produced for good and sufficient reasons. At the same time we must remember the object which the Legislature had in view in enacting section 139, Civil Procedure

(1) (1868) 1 B. L. R. 120,

(2) (1878) 21 W. R. 42.

Code. It was pointed out by this Court in the case of *Syed Ikram Hossain v. Ram Lochan Dutt* (1), and by the learned Judges of the Bombay High Court in the case of *Raichhod Hirabhai v. The Secretary of State* (2), that section 138 of the Code was enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion such as certified copies of public documents or records of Judicial proceedings. Now on an examination of the documents which the plaintiffs seek to produce at a late stage of this case, it turns out that by far the majority of them are copies of public documents. They are in most instances copies of Judicial proceedings as to the genuineness of which there could not be any possible controversy. There is only one document which does not fall within this description. It is a *kabulyat* executed on the 26th January 1899 by Bharosi Singh in favour of Sangam Lal. We have not been informed whether this document was registered. If it was a registered document it could not be suggested that there was any prejudice to the defendant by reason of delay in its production; it could not be said that the plaintiffs wanted time to manufacture it. Under these circumstances we must hold that the documents which were not mentioned in the list of 6th January 1905 should also be received in evidence except this *kabulyat* which may be received in evidence if it is a registered document, otherwise it will be excluded.

The learned vakil for the respondents strenuously contended that even in the view that these documents have been improperly excluded, there is no cause for a remand, because upon the facts found by both the Courts below, the claim of the plaintiffs is obviously barred by limitation. We are unable to accede to this contention. The documents which have been excluded relate not only to the question of title but also to the question of possession, and it is conceivable that if these documents had been received and acted upon, the conclusion of the Courts below upon the question of limitation might have been in favour of the plaintiffs. We must, therefore, hold that the plaintiffs are entitled to have their case tried out after these documents have been received in evidence. There can be no possible question that when a subordinate Court has refused in the erroneous exercise of its discretion to receive documentary evidence which ought to have been accepted, the High Court has ample power to interfere under section 584, Civil Procedure Code; see *Moni*

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(1) (1874) 23 W. R. 29

(2) (1896) I. L. R. 22 Bom. 173.

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Lal Bandyopadhyaya v. Khiroda Dasi (1), *Devi Das Jagjivan v. Pirjada Begum* (2) and *Minakshi v. Velu* (3).

The result, therefore, is that this appeal must be allowed, the decrees of the Courts below discharged and the case remanded to the Court of first instance in order that the evidence which has been excluded may be received as directed above. The plaintiffs will be at liberty to prove such of these documents as are required by law to be proved and the defendants will be at liberty to adduce rebutting evidence.

The costs of this appeal will abide the result.

A. T. M.

Appeal allowed; case remanded.

(1) (1893) I. L. R. 20 Calc. 740

(2) (1884) I. L. R. 8 Bom. 37.

(3) (1885) I. L. R. 8 Mad. 373

Before Mr. Justice Geidt and Mr. Justice Chitty.

RAJKUMAR SINGH AND OTHERS

v.

SHEO NARAIN SHA.*

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January, 31,

Costs—Mortgage decree—Decree for costs, if part of—Other properties—Transfer of Property Act (IV of 1882), Sec. 90.

A decree for costs is a part of the mortgage decree and in execution of such decree, the mortgaged properties must first be sold and only if such sale does not satisfy the whole decree, can the other properties of the mortgagor be proceeded with in the manner laid down in section 90 of the Transfer of Property Act

Magbul Fatima v. Lalta Prasad (1) followed.

Ratnessur v. Jusoda (2) and *Damodar v. Budh Kuar* (3) distinguished.

Appeal by the judgment-debtors.

Suit upon a mortgage.

The material facts and arguments appear from the judgment *Babu Dwarka Nath Mitter* for the Appellants.

Babu Harendra Krishna Mukherji for the Respondent.

The following judgment was delivered :

The only question we have to decide is whether a decree holder in executing a mortgage decree, can for the purpose of recovering the costs awarded by the decree, put up to sale properties other than the mortgaged property. The Subordinate Judge has held that he can and in support of his view he

* Appeal from Order No. 530 of 1906 against the order of Babu Saran Prasad Bose, Subordinate Judge, Saran, dated the 18th August 1906.

(1) (1899) I. L. R. 20 All. 523

(2) (1886) I. L. R. 14 Calc. 185.

(3) (1888) I. L. R. 10 All. 179.

referred to two cases [*Rutnessur Sein v. Jusoda* (1) and *Damodar Das v. Budh Kuar* (2).] These however were not cases where the decrees had been for sale of the mortgaged properties. They were decrees passed for foreclosure where the mortgage had been by way of conditional sale. The present case is similar to one decided by the Allahabad High Court reported in *Maqbul Fatima v. Lalta Prasad* (3), where it was held that the costs were really part of the amount for which the mortgaged property had been ordered to be sold. We are clearly of opinion that the decree for costs is a part of the mortgage decree and that the decree-holder must proceed in the first instance against the property mortgaged. It is only in the event of the mortgaged property being found insufficient to satisfy the mortgage decree that a decree-holder can proceed against the other properties, in the manner provided by section 90 of the Transfer of Property Act.

In this view of the case we allow the appeal, and set aside the order of the Subordinate Judge allowing the decree-holder to proceed against properties other than the mortgaged properties.

The appellants are entitled to their costs from the respondents, the hearing fees being assessed at three gold mohurs.

N K. B

Appeal allowed.

(1) (1886) I. L. R. 14 Calc. 185.

(2) (1888) I. L. R. 10 All. 179.

(3) (1898) I. L. R. 20 All. 523

Before Mr. Justice Mitra and Mr. Justice Bell.

DURGA PRASAD

v.

MADHO PRASAD AND OTHERS.*

Lis pendens—Transfer of Property Act (IV of 1882), Sec 52—Mortgage suit—
Interest in immovable property—Contentious suit.

A suit on a mortgage is a suit with respect to an interest in immovable property, and a suit for sale on a mortgage praying relief against the mortgagors and others is from the beginning a contentious suit within the meaning of section 52 of the Transfer of Property Act.

Faiyaz Husain Khan v. Prag Narain (1) referred to

* Appeal from Original Decree No. 183 of 1907, against the decree of Babu Umes Chunder Sen, Additional Subordinate Judge of Mozufferpur, dated the 17th December 1906.

(1) (1907) 5 C. L. J. 463; I. L. R. 29 All. 339; L. R. 34 I. A. 102.

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Appeal by Defendant No. 10.

Suit on mortgages.

The facts of the case and argument appear sufficiently from the judgment.

Babu Provas Chunder Mitter for the Appellant.

Babu Dwarka Nath Mitter for the Respondents.

The judgment of the Court was delivered by

Mitra J.—This is an appeal in a suit on three mortgages. One of the defendants in the suit was No. 10 who is the appellant before us. He was made a defendant because it was alleged by the plaintiff that he had purchased two of the mortgaged properties, namely, Katsikri and Matiwari. The lower Court, on the contentions raised before it, came to the conclusion that defendant No. 10, had a prior mortgage with respect to these two villages, but that the equity of redemption which was in the mortgagors was not lost by the sale on the mortgage which took place in execution of the mortgage decree obtained by Chhedi Ram and the defendant No. 10.

Chhedi Ram and defendant No. 10 had instituted a suit (No. 237 of 1904) against their mortgagors and other persons who had acquired interest in the mortgaged properties either as puisne encumbrancers or as purchasers of equity of redemption. The suit was contested by some of the defendants but the defendant No. 8 Bhagwan Das who was a puisne mortgagee did not contest it. During the pendency of the suit, the present plaintiff obtained an interest in the properties from Bhagwan Das. "He was the assignee of the puisne incumbrancer in favour of Bhagwan Das. On the 27th February 1905, a decree was made by the Court in the suit of Chhedi Ram and defendant No. 10 for sale of the mortgaged properties. Some of the defendants entered into a compromise with the plaintiffs. But it appears from the proceedings in the suit that the mortgage was duly proved and, so far as defendant No. 8 was concerned, the decree, though *ex parte*, was decree made on evidence duly recorded by the Court. In execution of this decree the two villages Katsikri and Matiwari were sold on the 9th November 1905 and were purchased by the decree holder Durga Prasad in whom the right of Chhedi Ram, the other decree holder, had also vested. The sale was subsequently confirmed and Durga Prasad purchased the property free from the mortgage lien in favour of Bhagwan Das.

The lower Court was of opinion that the plaintiff was not a transferee of immovable property within the meaning of section 52 of the Transfer of Property Act and his interest was not affected by the result of the suit of Chhedi Ram and Durga Prasad, and so the doctrine of *lis pendens* did not apply. It accordingly held that the plaintiff could still sell the equity of redemption, subject to the mortgage in favour of the appellant.

This view, in our opinion, cannot be supported either on principle or on the authorities. A mortgage suit with respect to immovable property is undoubtedly one covered by section 52 of the Transfer of Property Act. A simple mortgage is a transfer of an interest in immovable property and section 52 refers to any right to immovable property and prohibits the alienation of immovable property during the pendency of a suit respecting it or any other dealing with such property. It would be going against all principles and authorities to hold that a suit on a mortgage is not a suit with respect to an interest in immovable property.

Our attention has been drawn to the decision of this Court in *Upendra Chunder Singh v. Mohri Lall Marwari* (1) as laying down a contrary principle. In that case, however, the question raised before us was not directly in issue. The learned Judges who decided that case did not hold that in no case of a mortgage suit would the property in controversy be affected by the provisions of section 52 of the Transfer of Property Act. The learned Judges placed more reliance on the word "contentious" than on the words "right to immovable property" in section 52. If however, there was any doubt as regards the application of section 52 of the Transfer of Property Act it is dispelled by the recent decision of the Judicial Committee in *Faiyaz Hossain Khan v. Munshi Prag Narain* (2). We cannot, therefore, accept the view taken by the lower Court.

The learned vakil for the plaintiff respondent has attempted to support the decree of the lower Court on the ground that the suit which resulted in the auction purchase by the appellant was not a *contentious* suit within the meaning of section 52 of the Transfer of Property Act and, that the decree having been made by consent, the doctrine of *lis pendens* did not apply. This contention was not raised in the lower Court. It has been raised before us for the first time. Doubts were entertained by this Court as to the meaning of the expression "contentious

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(1) (1904) I. L. R. 31 Cal. 745 (2) (1907) L. R. 34 I. A. 102; 5 C. L. J. 563,

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proceeding." But the case to which we have referred namely *Faiyaz Hossain Khan v. Munshi Prag Narain* (1), has settled the law. It must now be held that a suit for sale on a mortgage which prays for relief against the mortgagors and others must be taken from the beginning to be a contentious suit within the meaning of section 52 of the Transfer of Property Act. In fact, as pointed out by their Lordships of the Judicial Committee, a suit is contentious in most cases from its institution and the doctrine as laid down in *Bellamy v. Sabine* (1) would apply even if the suit were decreed *ex parte*. In the present case, the mortgage decree was passed independently of the compromise by some of the defendants. We, therefore, see no reason to accept the contentions raised by the learned vakil for the respondent.

We, therefore, set aside the decree of the lower Court so far as the defendant No. 10 is concerned and direct that that decree be modified by the insertion of words to the effect that the right of the plaintiff to bring the two mouzas Katsikri and Matiwari to sale was extinguished except as to the *brit* lands. The zerait land should be considered as included within the mouzas which were purchased by the appellant. The plaintiff respondent must pay the costs of the appellant in both Courts.

A. T. M.

Appeal allowed : Decree varied.

(1) (1907) L. R. 34 I. A. 102.

(2) (1857) 1 DeG & J. 566.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

SADASIB JHEMKIR

v.

JALA GAONTIA.*

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June, 15.

Ejectment, suit for—Sub-lease, grant of, by tenant—Central Provinces Tenancy Act (XI of 1898), Sec. 46, Sub-Sec. (3)

Under the Central Provinces Tenancy Act, none but an occupancy tenant can be ejected from his holding for granting a sub-lease

Appeal by Defendant No. 2.

Suit for ejectment.

The facts of the case and argument appear sufficiently from the judgment.

*Babu Bepin Chunder Mullick for the Appellant.**Babu Satis Chunder Ghose for the Respondent.*

* Appeal from Appellate Decree No. 1799 of 1906, against the decree of P. Mitra Esq., District Judge of Sambalpur, dated the 17th July 1906, reversing that of Babu L. Patnaik, Munsiff of Bargarh, dated the 19th February 1906.

The judgment of the Court was as follows :

The plaintiff instituted the suit giving rise to the present appeal to eject the defendant No. 1 on the allegation that the land wrongfully occupied by him was the property of one Noro Binjhal, who having died childless, his rights devolved on the plaintiff as *gaontia* of the village. The defendant No. 1 pleaded that the defendant No. 2 was a necessary party as he had obtained the land from defendant No. 2. Defendant No. 2 then appeared and asserted his own right as tenant of the land.

The finding of the first Court was that the defendant No. 2 was the owner of the site in question, and the suit was accordingly dismissed.

On appeal, the District Judge, in a judgment which is not quite clear, held that the plaintiff was entitled to succeed, and that he should recover *khas* possession of the land in suit.

The defendant No. 2 is the appellant before us ; and, on his behalf, the learned vakil has attacked the decision of the District Judge on two grounds. The first contention is that the plaintiff, as *gaontia*, is not entitled to succeed on an intestacy, and that the Crown was the ultimate heir of Noro Binjhal on the facts alleged by the plaintiff. In support of this contention the learned vakil has cited section 46, sub-section (1) of the Central Provinces Tenancy Act (XI of 1898). But we observe that no question was raised in the Courts below as to the plaintiff's right to bring the suit in his capacity of village *gaontia*. It would appear that in terms of the *Wazibulars* he was the village *gaontia*, and, we take it that, he represents the Crown in the case of an intestacy and in other cases in which the exercise of his proprietary right on behalf of Government is necessary according to the local conditions prevalent. We, therefore, decline to give effect to this contention.

The second question argued by the learned vakil may be divided into two branches ; the first branch of the argument being that the Civil Court had no jurisdiction to entertain a suit in ejectment by reason of the provisions of sections 46, 47, 48 and 95 of the Central Provinces Tenancy Act, and the second branch being that there is no clear finding by the lower appellate Court as to the status of the defendant No. 2.

The case of *Icharam Singh v. Nilmony Bahida* (1), to which our attention has been called, is an undoubted authority on the scope of the sections we have just cited ; but we do not think

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that the facts of the present litigation can be brought within the purview of the rule laid down in that case. Apart from the prohibition in section 46, sub-section 3, of the Act which says : "No occupancy tenant shall be entitled to sub-let (except for a period not exceeding one year) or otherwise transfer his right in his holding or in any portion thereof and every such sub-lease (other than for a period not exceeding one year) or transfer shall be voidable in the manner and to the extent provided by the two next following sections"—there does not appear to be any provision of law by which the defendant No. 2 can be ejected from his holding on account of the sub-lease to defendant No. 1.

The real point in the case, therefore, is whether the defendant No. 2 is a tenant of the land. If the plaintiff succeeded to the rights of Noro Binjhal in the year 1899, then there was a gap of several years during which it does not appear who was the tenant of the land. It may be that the defendant No. 2 was a tenant all along of the particular *site* with which we are concerned, but the finding of the lower appellate Court is not sufficiently precise to enable us to ascertain what are the facts of the case.

We, therefore, think that the appeal must be allowed and the case go back to the District Judge for dealing with the appeal in accordance with the observations we have made. If the defendant No. 2 was a trespasser on the land and possessed no tenant right therein, there is nothing to preclude the plaintiff from seeing to eject him in the Civil Court, and, in that view of the case, the special provisions of the Central Provinces Tenancy Act would not be applicable. If, on the other hand, the defendant No. 2 was a tenant of the land when he lent it or let it to defendant No. 1, he is not liable to be ejected. In one or other view of the facts the lower appellate Court must decide whether the plaintiff is entitled to the relief he claims.

Costs will abide the result.

A. T. M.

Appeal allowed, case remanded

Before Mr. Justice Cox and Mr. Justice Doss.

SALIM SHEIKH AND OTHERS

v.

NAZIR KHAN.

CIVIL.

1908.

May, 25.

Civil Procedure Code (Act XIV of 1882), Sec 562—Remand—Preliminary point, what is—Liability for compensation—Amount of damages.

Where by reason of the decision on one or more of the issues recorded in the case, there has been no necessity for the consideration of the other issues, the suit was dismissed on a preliminary point. The appellate Court finding that the issues considered were wrongly decided and the suit wrongly dismissed, remanded the case for the disposal of the suit after consideration of the remaining issues :

Held, the suit was properly remanded under section 562.

There were two questions in the case *viz.*, the liability of the defendant to compensate the plaintiffs, and the amount of damages. The Court of first instance held the plaintiffs were not entitled to damages and dismissed the suit on this preliminary point. On appeal, the Court of appeal held the plaintiff was entitled to damages and remanded the suit for ascertainment of damages.

Held, the remand was proper.

Ramachandra v. Hazir Kasim (1) followed.

Appeal by the Defendants.

Suit for damages for crops cut and taken away.

The material facts and arguments appear from the judgment.

Babu Khetra Mohan Sen for the Appellants.

Babus Ram Chandra Majumdar and Akhilbandhu Ghosh for the Respondent.

The following judgment was delivered :

The plaintiffs in this case sued for damages for the value of crops taken away by the defendants from land which the plaintiffs held. The Court of first instance held that the defendants had not taken these crops, and dismissed the plaintiffs' suit. The lower appellate Court found that the plaintiffs grew the crops and that the defendants admittedly took them away. The Subordinate Judge held that the defendants were liable to pay damages to the plaintiffs, and remanded the case under section 562 of the Civil Procedure Code to the first Court, with a direction that the first Court should dispose of the question of the amount of damages already adduced. The

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In appeal, three points are taken : In the first place, it is said that the lower appellate Court is wrong in decreeing damages to the plaintiffs without finding that the plaintiffs had title to the land. This view appears to us to be wholly untenable. Even if the plaintiffs were not entitled to the land, still when the defendants were unable to prove a better title, the plaintiffs had a right to the enjoyment of the crops they had grown, and a right to sue the defendants for damages, if the latter took the crops away.

The second point raised is that the lower appellate Court should not have decreed the appeal against all the defendants and that Court was wrong in thinking that it was admitted that all the defendants joined in taking away the crops. But this point was not taken in the grounds of appeal to this Court, and we are not prepared to go into it now.

The third point taken is that the remand to the first Court is bad under section 564 of the Civil Procedure Code. To dispose of this point it is necessary to look at what the Munsiff actually decided. His judgment is not very intelligible. He lays down six issues for decision. Of these, the first three he decided in the plaintiffs' favour : and the fourth he regarded as subsidiary to the fifth. The fifth issue was "whether any of these defendants cut and took away the crops of the plaintiffs." He comes however to no very clear finding as to the cutting and taking away of the crops, but dismisses the suit on the ground apparently that the plaintiffs had failed to make out their title to the crops. And it is argued for the respondent that his decision on the fifth issue is a decision on a preliminary point which authorized the lower appellate Court to remand the case under section 562, for the decision of the remaining issue, namely, the sixth issue which deals with the question of the amount of damages. There appears to be no authority in this Court for the view put before us by the learned pleader for the respondent. But we think the view taken by Best J. in *Ramchandra Joishi v. Hazi Kassim* (1), which is quoted by the Allahabad High Court in *Mata Din v. Jamna Das* (2) is reasonable. In that case Best J. said "I take it that a suit is disposed of on a preliminary point within the meaning of section 562 when by reason of the decision on one or more of the issues recorded in the case, there has been no necessity for the consideration of the other issues, and that if in such a case the appellate Court finds that the issues

(1) (1892) I. L. R. 16 Mad 207.

(2) (1905) I. L. R. 27 All. 691.

considered have been wrongly decided, and the suit in consequence wrongly dismissed, and that a consideration of the other issues is necessary for a proper disposal of the suit, a remand is allowable." Two questions have to be considered in this case: *Firstly*, whether the plaintiffs were entitled to compensation and *secondly*, if so, what should be the amount of compensation awarded. The suit was disposed of on the first of these two points, namely, that the plaintiffs were not entitled to compensation at all: and, we think it is not unreasonable to hold that that is a preliminary point, and when the lower appellate Court has set aside the decision of the first Court on that point, it may, under section 562, remand the case for decision of the remaining point, namely, to what compensation the plaintiffs were entitled.

The appeal is, accordingly, dismissed with costs.

N. K. B.

Appeal dismissed.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

* GOUR KAIBARTA AND OTHERS

v.

SRIMATI TARAJAN BIBI AND OTHERS *

Bengal Tenancy Act (VIII of 1985), Sec. 88—Sub-division of holding—Rights of purchaser—Landlord's title not questioned.

Where the landlord's rights are not questioned and he does not appear in the suit, a transferee of a share of a holding may maintain a suit against persons who claim under an inferior title, even though they may set up a recognition by the landlord.

Kuldip Singh v. Gillanders (1) distinguished.

Benodini Dasi v. Peary Mohun (2) and *Asgar Ali v. Asabuddin* (3) followed in principle.

Appeal by the Plaintiffs.

Suit for possession of land.

The material facts and arguments appear from the judgment.

Moulvie Syed Shamsul Huda and Babu Girija Prasanna Roy Choudhury for the Appellants.

Babu Dwarkanath Chakravarti and Mr. G. Sircar for the Respondents.

C. A. V.

* Appeal from Appellate Decree No. 844 of 1906 against the decision of W. B. Brown, Esq., District Judge of Tippera, dated the 12th February 1906, reversing that of Babu Khagendra Nath Bose, Munsiff, Brahmanberia, dated the 27th February 1905.

(1) (1899) I. L. R. 26 Calc. 615.

(2) (1903) 8 C. W. N. 55.

(3) (1904) 9 C. W. N. 134.

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March, 4.

The following judgment was delivered :

The plaintiff in this suit claims a declaration of a ryoti right in certain land in his favour, and possession of the land, founding his claim on a kabala of 1309 B.S. The defendants resist this claim on an allegation of earlier though unregistered kabalas in their favour, and relying on the fact that they are in possession of the land as the result of proceedings under section 9 of the Specific Relief Act, and, as is found, with their recognition as tenants by the landlord, seek to impugn the plaintiff's right under his kabala for the reason hereafter mentioned. The lower appellate Court finds that the defendants bought the land and got possession of it, but their documents of title being unregistered rightly holds that the plaintiff's kabala must prevail unless the defendants can resist his claim on legal grounds. The only such ground that has been urged before us is that the sale to the plaintiff was of a portion only of the ryoti holding of the grantor, and was therefore invalid under section 88 of the Bengal Tenancy Act. This ground has been held a good one by the lower appellate Court, relying on the decision in *Khdap Singh v. Gillanders Arbuthnot & Co.* (1). Later decisions however seem to preclude us from applying the principle there laid down. The essential difference between that case and the present is that there the purchaser of a portion of the ryote attempted to set up the right he had acquired against the landlord, here he sets it up against the purchasers from the tenant who at most have been recognised by the landlord as tenants in respect of the right set up by the plaintiff. In *Benodini Dassi v. Peary Mohan Haldar* (2) it is held that where the landlord is not called on to recognise a sub-division, the purchase of a share of a holding does not disentitle the purchaser of a share to be considered owner of the share as far as section 310A is concerned. In *Asgar Ali v. Asabuddin Kazi* (3) the purchaser of a share of a holding was held to be entitled to take proceedings under section 311, Civil Procedure Code, on a comparison of the two former cases, and the same line of reasoning was also followed in *Rai Kamaleswari Prosad Singh Bahadur v. Maharajah Harballabh Narain Singh Bahadur* (4). On these decisions the only question left open to us is whether the recognition of the defendants, by the landlord as his tenants makes the landlord a party to this case sufficiently to bring the case within the

(1) (1899) I. L. R. 26 Cal. 615.

(3) (1904) 9 C. W. N. 134.

(2) (1903) 8 C. W. N. 55.

(4) (1905) 2 C. L. J. 369.

ruling in *Kuldip Singh v. Gillanders* (1), and we are of opinion that it does not. The landlord is a party to this case, but has not entered appearance, and no question as to his rights in the land has been raised.

The result is that the appeal is allowed, the judgment and decree of the lower appellate Court are set aside, and the decree of the Munsiff is restored. The appellant is entitled to his costs in this Court and in the lower appellate Court.

N. K. B.

Appeal decreed.

(1) (1899) I L. J. 26 Calc. 615.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin

ASKARAN BAID AND ANOTHER

v.

PIR BUX AND ANOTHER.*

Negotiable Instruments Act (XXVI of 1881) Secs. 30, 39, 86—Hundi payable at sight—Unconditional acceptance—Holder agreeing to arrangement for payment with acceptor—Notice of dishonour, omission to give—Drawer discharged.

The acceptor of a *hundi* payable at sight accepted the *hundi* unconditionally. The holder of the note agreed to receive the money in 3 days' time and did not give notice to the drawer of this arrangement. The acceptor failed to pay the amount within the promised time, the holder gave the drawer notice of dishonour, 10 days after that date.

Held—That the conduct of the holder discharged the drawer from his liability under the terms of sections 30, 39 and 86 of the Negotiable Instruments Act.

Appeal by the Plaintiffs.

Suit by the plaintiffs, the holders of a *hundi*, against the drawer for the balance of money due to them.

The facts of the case and argument appear sufficiently from the judgments.

Dr. Rash Behary Ghose and Babus Jogendra Nath Mukerjee and Hemendra Nath Sen for the Appellants.

Babus Umakali Mookerjee and Joy Gopal Ghosha for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Rampini J.—The facts of this case are as follows: The plaintiff is the holder of a *hundi* payable at sight drawn by one

* Appeal from Appellate Decree No. 1082 of 1906, against the decree of J. C. Twidell, Esq., District Judge of Purnea, dated the 31st March 1906, affirming that of Babu Surja Narain Das, Subordinate Judge of Purneah, dated the 5th June 1906.

CIVIL.

1906.

Gour Kalbatt
v.
Srimati Taraia
Bibi.

CIVIL.

1908.

April, 3, 6, 7, 9.

CIVIL.

1908.

Askaran Baid

v.

Pir Bux.

Rampini, J.

Pir Bux of Kishengunge in the Purnea district on Abdus Sobhan, a hide-broker in Calcutta. The *hundi* was presented to Abdus Sobhan, along with two bills of lading for parcels of hides despatched by Pir Bux to Calcutta. Abdus Sobhan accepted the *hundi* and promised to pay within three days. Subsequently he paid Rs. 1027 out of Rs. 4000, the amount of the *hundi*; after about a month, he became bankrupt. The date of the *hundi* was the 17th January. Notice of dishonour was not given to Pir Bux till the 29th January. Now, the plaintiff, the holder of the *hundi*, sues Pir Bux, the drawer, for the balance due to him. Both the lower Courts have dismissed the suit on substantially the same grounds, *viz.*, (1) that the notice of dishonour was not given in due time and (2) that the drawer was discharged by the holder of the note giving time to the acceptor to pay the money, an arrangement not notified to the drawer, nor acquiesced in by him. The plaintiff appeals and, on his behalf, it has been urged (1) the question of the acceptance by Abdus Sobhan having been a qualified one was not raised in the pleadings or issues; (2) that there was no qualified acceptance, as such an acceptance must be in writing; (3) that if the question was and could be raised, there was acquiescence on the part of the drawer and (4) that the question of the notice of dishonour not having been given in time was not raised in the issues or pleadings that the notice was given in time and that the drawer was not prejudiced by the delay.

We consider, however, that the decisions of the lower Courts are correct. It is clear that the acceptor at first accepted the *hundi* unconditionally in consideration of the two bills of lading for the parcels of hides attached to the *hundi*. He subsequently said he would pay in three days and did not so pay. The holder of the note agreed to receive the money in three days time, and did not give notice to the drawer of this arrangement and did not even give him notice of dishonour till about ten days subsequently. We consider that this conduct of the plaintiff according to the terms of sections 30, 39, and 86 of the Negotiable Instruments Act discharged the drawer and that the plaintiff cannot now recover from the drawer, the defendant No. 1.

The pleas that the questions of the acceptance having been qualified and of the notice of dishonour not having been given in due time were not raised in the pleadings or issues are purely technical pleas devoid of all substance. The parties very well understood the matters at issue between them and they were

sufficiently raised in the first issue framed by the Subordinate Judge. The parties must have well understood that notice of dishonour should have been given without undue delay and, whether they understood it or not, this is undoubtedly the law. As the District Judge has pointed out, the plaintiff is on the horns of a dilemma. Either he did not give notice of dishonour in due time or he agreed to payment at a subsequent date, of which notice was not given to the drawer and in which there is nothing to show he ever acquiesced. In either case the defendant No. 1 is relieved of his liability under the *hundt*.

We dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

SPECIAL BENCH.

Before the Hon'ble R. F. Rampini, acting Chief Justice, Mr. Justice Stephen and Mr. Justice Fletcher.

IN THE MATTER OF LAWRENCE WILSON, an Attorney.

Unprofessional conduct—Attorney appearing for plaintiff and defendant.

An attorney who in the name of a firm of which he was the sole partner appeared on behalf of the plaintiff, also appeared in his own personal capacity for the defendants.

Held, that he was guilty of contempt of Court and of improper behaviour, and must be suspended.

This was a rule calling on Lawrence Wilson an attorney of the High Court to show cause why his name should not be removed from the roll of attorneys of the Court or why he should not be suspended from practising as an attorney of this Court for such term as may seem fit, on account of professional misconduct.

A copy of this order was served upon the Advocate-General of Bengal and notice of the order was given to the new Incorporated Law Society of Calcutta. The matter arose out of the suit of *Shaik Solaman v. Shaikh Manikjan* before Fletcher J. in which his Lordship recorded the following opinion. "I see the same attorney has entered appearance on both sides, one in the name of his firm and the other in his own name. It is a discreditable conduct on the attorney's part. I will call the Chief Justice's attention to it." On the matter being reported to the Chief Justice, this rule was issued.

The Hon'ble S. P. Sinha (*Advocate-General*) left the matter to their Lordships.

CIVIL,

1908.

Askaran Baid

r.
Pir Bux.

Rampini, J.

CIVIL,

1908.

June, 15,

CIVIL.

1908.

In the matter of
Lawrence Wilson.

Rampini, C. J.

Mr. L. P. E. Pugh—On behalf of the Incorporated Law Society of Calcutta, cited *Berry v. Jenkins* (1), and *In re Four Solicitors* (2), and left the matter in their Lordships' hands.

Mr. B. Chakraverty for the attorney in showing cause said that his client unreservedly apologised to their Lordships for the conduct which had been brought to their notice. When the suit was filed, all the other members of the family came in and there was an arrangement that a decree should be made. Then there was some contentions raised and Mr. Wilson suggested that another attorney should be appointed for the defendants. He placed himself entirely and unreservedly in their Lordships' hands.

The judgment of the Court was delivered by

Rampini C. J.—This is a Rule calling upon Mr. L. Wilson an attorney of this Court, to show cause why he should not be suspended from practising as an attorney or why his name should not be struck off the roll of attorneys of this Court, on account of professional misconduct.

The facts are that a plaint was put in the Original Side of the Court on behalf of a certain person who wished to set aside two *wakfnamas* executed by Shaik Haji Abdul Khansama on the 7th October 1880 and the 27th September 1890. This plaint was signed by Carruther & Co., of which firm Mr. Lawrence Wilson is the sole partner, the warrant of attorney is also in the name of Messrs. Carruther and Co. Subsequently a written statement was put in by the defendants, in the second paragraph of which the first *wakf* of the 7th October 1880 was admitted to be a real endowment. But it was agreed in the 6th paragraph that the second *wakf* of the 27th September 1890 should be set aside as not valid. The warrant to defend on behalf of the defendants was in the name of Mr. Lawrence Wilson, who was, as already mentioned, the sole partner of the firm of Messrs. Carruther and Co., what is very noteworthy is that on the back of the written statement there is an endorsement to the effect that "the time to file the defendants' written statement expired during the holidays, but no steps have been taken by the other side." This appears to be a device to strengthen the impression that the other side was represented by a person different from Mr. Lawrence Wilson. When the case came before one of the members of this Bench, all the defendants except Shukurjan, appeared by Mr. Sen, Mr. Mehta appeared for the plaintiff,

and an endeavour was made to obtain a consent order from the Court. The Judge, however, observed that the same attorney represented both sides and reported the matter to the Chief Justice and this Rule was consequently issued.

Mr. Chakravarti on behalf of Mr. Wilson admits that Mr. Wilson was guilty of an error of judgment, but contends that the mistake was a *bonafide* mistake on the part of Mr. Wilson and that there was no intention to deceive the Court. We think, however, that there was an evident intention to deceive the Court. Mr. Wilson in the name of Messrs. Carruther & Co., appeared on behalf of the plaintiff and Mr. Wilson in his own personal capacity appeared on behalf of the defendants. This was surely an endeavour on the part of Mr. Wilson to lead the Court to believe that the parties were represented by two different attorneys. *Secondly*, the written statement put in on behalf of the defendants was clearly an improper one, seeing that the defendants were trustees and it was their duty to uphold the *wakfs* and not to agree to set one of them aside. *Thirdly*, it appears to us that any attorney of experience, and we are informed that Mr. Wilson is an attorney of 16 years standing, must have seen that the suit was a collusive one and fraudulent one, brought for the purpose of setting aside *wakfs* executed by Haji Abdul Khansama. Mr. Wilson has further added to his misconduct by not appearing at the hearing of this Rule, although we have reason to believe that he was present in Court this morning as he came to swear to the affidavit which was put in on his behalf.

We therefore can not acquit Mr. Wilson of the charge of an attempt to deceive the Court. We think that in acting thus, he is guilty of contempt of Court and of improper behaviour as an officer of this Court. We accordingly direct that he be suspended from practising as an attorney for the period of one year or for such longer period as he shall not be able to satisfy the Court that he intends personally to carry on business within the limits of the Original Jurisdiction of this Court for his own benefit.

Mr. Wilson must pay the costs of this Rule. We allow separate costs to the Advocate General, and Mr. Pugh also, who represents the Incorporated Law Society.

S. C. R.

CIVIL.

1908.

In the matter of
Lawrence Wilson.

Rampini, C. J.

APPELLATE CIVIL.

*Before Sir Francis William Maclean, Kt., K.C.I.E., Chief Justice
and Mr. Justice Doss.*

CIVIL.

1908.

February, 25.

RAJABALA DEBI AND ON HER DEATH HER HEIRS AND LEGAL
REPRESENTATIVES KAMINI KUMAR LAHIRI AND OTHERS

v.

NUFFER CHUNDER PAL CHOWDHURY AND OTHERS.*

ANANDA GOPAL GOSSAIN AND OTHERS

v.

NUFFER CHUNDER PAL CHOWDHURY AND OTHERS.*

*Civil Procedure Code (Act XIV of 1882), Sec. 595—Final—Remand order—
Decision of issue governing the case—Leave to appeal to Privy Council*

The purchasers of a *putni*, which was sold for its own arrears, sued the defendants for *khas* possession on the ground that they were trespassers after annulment of their incumbrances by notices duly issued under section 167 of the Bengal Tenancy Act. The Court of first instance dismissed the suit on the ground that the plaintiffs failed to prove that the notices were duly issued and served. The appellate Court took the opposite view, holding that the notices had been properly served and remanded the case for the trial of other issues.

Held, that though the order purported to be only an order of remand, yet as the appellate Court reversed the decision of the first Court upon an issue which governed the whole case, the decree of the appellate Court is a final decree within the meaning of section 595 of the Code of Civil Procedure.

Rahimkhoy v. C. A. Turner (1) and *Sayid Muzhar v. Mussamat Bodha* (2) referred to.

Applications for leave to appeal to His Majesty in Council by the Defendant.

The facts of the case were as follows :—The plaintiffs, who were the purchasers of a *putni*, which was sold for its own arrears, alleged that they applied for the issue of notices under the provisions of section 167 of the Bengal Tenancy Act for the annulment of the incumbrances held by the defendants under the *putni*; that the notices were duly issued by the Collector; that the incumbrances held by the defendant therefore came to an end and that the defendants were consequently no longer

* Applications Nos. 1 and 2 of 1908 for leave to appeal to His Majesty in Council in appeals from Original Decrees Nos. 427 and 450 of 1905, against the decrees of Rampini and Sharfuddin JJ, dated the 28th August 1907, reversing those of Babu Bhagabuttu Churn Mitra, Subordinate Judge of Nadia, dated the 31st July 1905.

entitled to occupy the land. They accordingly brought two suits for *khas* possession and mesne profits.

The Subordinate Judge dismissed the plaintiffs' suit; he held that the suits were defective for non-joinder and misjoinder of parties, and also that the plaintiff failed to prove the service of the notices issued under section 167 of the Bengal Tenancy Act.

On appeal by the plaintiffs to the High Court it was held that the notices were duly issued and served, and that no suit was liable to be dismissed for misjoinder of parties. The appellants' Counsel gave up all the defendants except one in one suit and added one defendant in the other suit. The suits were then remanded to the lower Court for the decision of the other issues.

Against that decision of the High Court two applications were made by the defendants for leave to appeal to His Majesty in Council.

Babu Sarat Chunder Khan for the Petitioners

Babu Amarendra Nath Bose for the Opposite Party.

The judgment of the Court was delivered by

Maclean C. J.—This is an application for a certificate that the case is a fit and proper one for appeal to His Majesty in Council.

The suit was one under section 167 of the Bengal Tenancy Act and the object of it was to annul certain encumbrances by giving notice under section 167 of the Act.

The cardinal point in the suit was whether the notice was properly served. The Subordinate Judge found that it was not, and dismissed the suit. This Court took an opposite view and held that notice had been properly served and remanded the case to be tried out on the other issues. An application is now made for leave to appeal to His Majesty in Council from the decision of this Court and the only question is whether the order passed by this Court is a final decree within the meaning of section 595 of the Code of Civil Procedure. On the face it purports to be only an order of remand, but the question whether the notice was properly served or not is, as I have said, the cardinal point in the case. If the view taken by the Subordinate Judge is correct then there is an end of the suit and the decree, therefore, was final, and the petitioner contends that this is a final decree, because, if notice was not properly served, the suit must fail, and the defendant is released from further liability. He says he is entitled to have that question decided by the Judicial Committee, I think his contention must prevail.

CIVIL.

1908.

Rajabala Debi
and others

v.
Nuffer Chunder
Pal Chowdhury.

CIVIL.

1908.

Rajabala Debi
and othersv.
Nuffer Chunder
Pal Chowdhury.

Maolean, C. J.

The case appears to me to be governed in principle by the judgments of the Judicial Committee, in the case of *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi* (1) and of *Rahimbhoy Habibbhoy v. C. A. Turner* (2). No question arises as to value and the decree against which it is sought to appeal is one of reversal.

I think therefore that a certificate must be granted. This order will also govern the application for leave to appeal to His Majesty in Council, No. 2 of 1908.

A. T. M.

Leave granted.

(1) (1894) I L. R. 17 All. 113 (P. C.) (2) (1890) I. L. R. 15 Bom. 155. (P. C.)

[Subsequently the applicants failed to deposit the costs for the preparations of the paper books and to give the securities for the costs of the respondents and the appeals were struck off—Rep.]

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

BARAIK KAMAL SAHI AND OTHERS

v.

LILHU CHRISTIAN AND OTHERS*

CIVIL.

1908.

May, 29
June, 2.

Onus of proof—Ejectment, suit for—Nij jote land, suit for possession of Makarraridar—Occupancy riyat, plea of.

In a suit for ejectment from *nij jote* lands, where the defence set up right of occupancy, when the plaintiff was admitted to be a *makarraridar* the landlord, it lies upon the defendants to make out that they are occupant riyats and are entitled to remain there.

Narsing Narain Singh v. Dharam Thakur (1) and *Hiramoti Dassya Annoda Prosad Ghosh* (2) referred to *Rajendra Kumar Bose v. Mohim Chand Ghose* (3) explained.

Appeal by the Plaintiffs.

Suit for ejectment.

The facts of the case appear sufficiently from the judgment *Mr. Caspersz* (Counsel) and *Babu Joges Chunder Dey* the Appellants.

Babus Basant Kumar Bose and *Biraj Mohun Mojuma* (for *Babu Jnanendra Nath Bose*) for the Respondents.

C. A.

The judgment of the Court was delivered by

Caspersz J.—This is a second appeal arising out of a suit by the plaintiffs (appellants) for ejectment of the defendants.

* Appeal from Appellate Decree No. 1648 of 1906, against the decree of E. E. Forrester Esq., Officiating Judicial Commissioner of Chota Nagpore District, dated the 25th July 1906, reversing that of Babu Bamandas Mukherjee, Munsiff of Ranchi, dated the 18th December 1906.

(1) (1904) 9 C. W. N. 144

(2) (1908) 7 C. L. J. 553.

(3) (1894) 3 C. W. N. 763.

(respondents), from $3\frac{1}{2}$ powas of *don* lands, situated in village Totami, on the allegation that the plaintiffs had taken a *surpeshgi* of an 8 annas share of the above-mentioned village in the year 1936 S. (1879-80) from its malik Bansrai who, subsequently, conveyed that share to the plaintiffs in makarrari. They further alleged that since their *surpeshgi* they had been in possession of all the *nij jote* lands of Bansrai including the lands in suit, first, as *surpeshgidars* and, then, as makarraridars, when in the year 1961 S. (1904) the defendants dispossessed the plaintiffs of $3\frac{1}{2}$ powas of *nij jote* land. They, lastly, alleged that the defendants had no right or title to the lands in suit and that they are trespassers.

The defendants' case is that the land in suit is the ancestral raiyati holding of defendants Nos. 1-3 and that neither Bansrai nor the plaintiffs ever had *khas* possession of the same and that defendant Temba has acquired a right of occupancy in it.

The munsiff gave a decree to the plaintiffs holding that, the *onus* being on the defendants to prove that the land in suit was their occupancy holding, they had not discharged it. On appeal, the learned Judicial Commissioner has dismissed the plaintiffs' suit holding that it was incumbent on the plaintiffs to prove that the land was *khas* land when they obtained the makarrari, and that they had been dispossessed by the defendants at or about the time mentioned in the plaint.

The plaintiffs appeal, and the only contention urged before us is that of *onus*: it is contended that inasmuch as the makarrari right was admitted, it was on the defendants to prove their own allegation before the suit could be dismissed. On behalf of the defendants it is urged that since the whole question rested on a decision as to whether the land in suit was *nij jote* land or not, the *onus* was on the plaintiffs who alleged that the land in suit was *khas* land.

Our attention has been called to various authorities, on behalf of the appellants, in support of their contention that the *onus* lay on the defendants in the circumstances detailed. One of the most recent authorities, to which reference is made, is the case of *Narsing Narian Singh v. Dharam Thakur* (1), in which case the plaintiff as a zemindar sued to recover from the defendants possession of certain lands which he claimed to be *zerait* lands. The defendants admitted the plaintiff's title as zemindar but set up title as raiyat. In this case, also, the Court of first

CIVIL.

1908.

Barak Kamal Sah

v.

Lilhu Christian.

Cuiperaz, J.

CIVIL

1908.

Baraik Kamal Sahi
v.

Lilhu Christian,

Casperz, J.

instance, as in the present case, had decreed the plaintiff's claim holding that the lands were his zeraït lands, and the lower appellate Court in that case, as here, throwing the *onus* on the plaintiff, had held that the plaintiff had failed to establish that the lands in suit were his zeraït lands.

On this authority the plaintiffs assailed the decision of the lower appellate Court on the ground that its judgment is erroneous inasmuch as the plaintiffs' claim could not be rightly dismissed, when their right as zemindars is admitted, even though the lands be not proved to be zeraït lands unless and until the defendants establish the tenancy upon which they rely.

Another recent authority is *Hiramati Dassya v. Anmoda Prosad Ghosh* (1). This was a suit in ejectment, where the defence had set up a tenure, by right of purchase from the former tenant, and it was held that if the plaintiff has proved that he is the owner of the land it lies upon the defendant to make out that he is a tenure-holder and is entitled to remain thereon.

On behalf of the respondents, as already observed, it was contended that the *onus* was rightly placed by the lower appellate Court on the plaintiffs, and, in support of their contention, reference has been made to the case of *Rajendra Kumar Bose v. Mohim Chandra Ghose* (2). This was a case in which a landlord sued for *khas* possession of land in defendants' possession, while the defendants had set up and proved an intermediate tenure, and it was held that it was on the plaintiffs to show that the parcel of land sought to be resumed was outside such tenure. The facts of the present case are different. Here it is not admitted that the defendants had raiyati interests within the makarrari of the plaintiffs. On the contrary, we find it stated in the plaint that the defendants have no connection whatever with the disputed land; while the defendants in their defence admit the superior title of the plaintiffs.

On a review of the authorities we are of opinion that, in the circumstances of the present case, the *onus* lay on the defendants to prove their occupancy right.

It appears that there were three defendants in the suit, *viz.*, Temba who claimed to have been in possession of 2½ powas of land as an occupancy raiyat; and Lilhu and Chanroo who claimed to have been in possession of the other powa of land as maurashi raiyat. The learned Judicial Commissioner says it is proved that Temba has a tenancy though I do not consider that he has

(1) (1908) 7 C. L. J. 553.

(2) (1894) 3 C. W. N. 763.

established that he has held the land for 12 years. On these facts I hold that plaintiffs are not entitled to a decree of *khas* possession against Temba. Lilhu and Chanroo have not appeared to depose in support of their tenancy but holding as I do, that the *onus* is on the plaintiffs to prove that the land is *khas* land, I do not think they are entitled to a decree against them. These findings warrant belief that none of the defendants had at all proved their special tenancies, but the lower appellate Court does not distinctly say so, and it seems to have thought it unnecessary to enter into that question as it thought that the *onus* was on the plaintiffs to prove their possession over the land in suit as their *khas* land. That being so, we think this appeal must be allowed and the case remanded to the learned Judicial Commissioner in order that he may determine, on the facts recorded, whether the defendants have established their respective tenancies under the plaintiffs.

Costs will abide the result.

A. F. M.

Appeal decreed Case remanded.

Before Mr. Justice Mitra and Mr. Justice Bell.

KEDAR PROSANNA LAHIRI

GIRINDRA PROSAD SUKUL AND OTHERS.*

Redemption, right of—Mortgage—Purchases by prior and puisne mortgagees—Accounting—Tenants settled on the land by prior mortgagee, right of.

Where the prior mortgagee purchased the property mortgaged to him in a suit in which the puisne mortgagee was not made a party and the latter also purchased the same property subsequently in a suit in which the prior mortgagee was not made a party :

Held, that each party would be entitled to redeem the other ; but the preferable right to redeem was with the puisne mortgagee †

The puisne mortgagee is bound to pay the mortgage money with interest at the rate specified in the mortgage to the prior mortgagee and any amount paid by the prior mortgagee in possession for the protection of the property or for redeeming any prior mortgage with interest as also the costs of the suit and appeal as in an ordinary redemption suit. An account was to be taken of the amounts realised from the property by the prior mortgagee as mortgagee in

* Appeal from Original Decree No. 402 of 1905, against the decree of Babu Radha Nath Sen, Subordinate Judge of Rajshahye, dated the 30th May 1905.

† But see *Umes Chunder Sircar v Zahur Fatima*, (1889) 1 L. R. 18 Calc. 164 (P. C.), *Perunal v. Kaveri*, (1892) 1 L. R. 16 Mad. 121 at 125-6, *Rangasamy Naikun v. Jelli Bodi Naiken*, (1902) 1 L. R. 28 Mad. 484, *Debendra Narain Roy v. Ramtaran Banerji* (1903) 1 L. R. 30 Calc. 599, per Maclean C. J. at 605 and *Hasanbhai v. Umaji*, (1903) 1 L. R. 28 Bom. 153—Rep.]

CIVIL.

1908.

Burak Kamal Sahi

v.

Lilhu Christian.

Casperz, J.

CIVIL.

1908.

June, 23.

CIVIL.

1908.

Kedar Prosanna
Lahiri
v.
Girindra Prosad
Sukul.

possession from the date of the possession taken by him (prior mortgagee). If on taking accounts any balance be found in favour of the puisne mortgagee, the prior mortgagee will be bound to pay the said amount to him; but if otherwise, then the usual decree in redemption suit will be passed.

The tenants settled by the prior mortgagee on the land are entitled to remain on the land until it be found in any subsequent suit or suits that they are liable to ejectment under the Bengal Tenancy Act or any other Act that may be in force.

Appeal by the Plaintiff.

Suit for declaration of title to and recovery of possession of land or in the alternative for redemption.

The facts of the case appear sufficiently from the judgment.

Mr. A Chowdhury and Babu Hari Charan Sarkhel for the Appellant.

Babus Hemendra Nath Sen and Ramakant Bhattacharjee for the Respondents.

The judgment of the Court was delivered by

Mitra J.—The questions which arise for our determination in this appeal are few. The suit which was one for declaration of title to and recovery of possession of land was contested in the lower Court on various grounds. Several issues were framed which are set out at p. 23 of the paper-book. The findings of the lower Court on most of these issues are against the plaintiff and it is not necessary to notice them in our judgment. On the question of *benami* which is formulated in the third issue, the finding is that the husband of the defendant No. 2 was not the *benamidar* of the mother of the defendant No. 1. The finding on this issue disposes of the question as to the right of the plaintiff to possession of the property by virtue of his purchase under the sale held in 1897.

As regards the fifth issue, the finding of the lower Court is also against the plaintiff. Mr. Chowdhury for the plaintiff appellant has attempted to show that the properties purchased by the plaintiff are not identical with the properties held by the defendants and purchased under a prior mortgage. The finding of the lower Court on this question is in our opinion supported by the evidence and we do not see any reason to interfere with it.

The sixth issue raises the question of possession and, in the view we take of the rights of the parties, it is immaterial whether the plaintiff or the second defendant was in possession. But, on the finding which has been arrived at by the lower Court, that is, the second defendant was in possession, the question as to the

rights which are pleaded in the plaint arises and we shall refer to this matter presently.

The other issues raise questions which are at present immaterial.

The facts which have been found are these :—The defendant No. 47, Iswar Chunder Ghose, and his brother Bhugwan Chunder Ghose mortgaged the properties in dispute to defendant No. 48, Tarini Kant Chowdhury in the year 1888. The sum covered by the mortgage was Rs. 422 and interest was stipulated to be paid at the rate of 37½ per cent. per annum. On the failure of the mortgagors to pay the money ; Tarini Kant instituted a suit on his mortgage and obtained a decree on the 28th March 1893. The decree was one for sale of the mortgaged properties. He executed the decree, caused the properties to be sold and himself purchased at the sale. Subsequently Tarini Kant sold in 1301 B S. the properties by a *kobala* to the husband of the defendant No. 2 and it appears that the defendant No. 2 took possession in 1894. Tarini Kant did not make the puisne mortgagee, that is to say, the mother of the defendant No. 1, a party to his suit. That was a defect which has brought about the present litigation.

In 1892, the two brothers Iswar Chunder and Bhugwan Chunder mortgaged, according to the finding of the lower Court, some properties to the mother of the defendant No. 1. She got a decree in 1894 and caused the sale of the mortgaged properties in 1897 and the plaintiff purchased at that sale. The plaintiff took formal possession in 1898. There was the usual contest about possession after 1898. It appears that the disputes about possession really began in 1901. In a proceeding in the Criminal Court it was declared that the defendant No. 2 was in possession and the tenant defendants Nos 3 to 45 were in occupation as raiyats. The present suit was instituted, as we have said, for declaration of title and for possession, or in the alternative, for redemption.

The first prayer must fail on the findings of the lower Court. As regards the second alternative prayer for redemption that has been allowed by the lower Court.

The only question which really remains for our decision is what are the conditions on which redemption should be allowed. The first mortgagee, that is, Tarini Kant did not make the second mortgagee a party neither did the second mortgagee make

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first mortgagee a party. Each party will be entitled to redeem the other; but the preferable right to redeem is with the plaintiff. The plaintiff is, according to the ordinary rule in redemption cases, bound to pay the mortgage money with interest at the rate specified in the mortgage and any amount paid by the mortgagee in possession for the protection of the property or for redeeming any prior mortgage with interest as also the costs of the suit and the appeal as in an ordinary redemption suit. The decree of the lower Court in this respect is not quite clear and there is no reason why the lower Court should not direct that an account should be taken of the amounts realized from the property by the defendant No. 2 as mortgagee in possession from the date of the possession taken in the year 1894. It might be that the conduct of the plaintiff was not as good as it should have been. In fact, there were conflicting rights and the questions which arose on account of laches on both sides. It may also be that, if the mortgagee in possession in order to protect her right had to spend any money which really went towards the protection of the property, she would be entitled to the benefit of such payments. But the rough and ready way of calculation adopted by the lower Court is not proper to be followed in redemption suits.

We, therefore, direct that the decree of the lower Court be modified in the following way:—That an account be taken of the mortgage money due and payable under the mortgage of the 5th May 1888 with interest thereon at the rate specified in it as also of the sum of Rs. 1693-6-6 with interest thereon at the rate of twelve per cent. per annum from the beginning of the year 1308, the said amount having been paid for redemption of the prior mortgage and the costs of the litigation in both Courts and also of the amount received by the said defendant No. 2 from the date of his taking possession from the tenants in occupation and that the one be set off against the other, and that a decree be made for the balance, the plaintiff being at liberty to pay the said amount within six months from the date of the amount by the lower Court and, on his so paying, the defendant No. 2 should deliver up to him all documents in his possession or power and re-transfer the property to him. On the failure of the plaintiff to pay the said amount within the time specified, he will be debarred from all rights to redeem and the defendant No. 2 will be entitled to continue in possession of the property absolutely and without the plaintiff having any further right to redeem. If, on taking

the account, it be found that the balance is in favour of the plaintiff, the said defendant No. 2 will be bound to pay the said amount to the plaintiff.

As regards the right of the defendants Nos. 3 to 45, it appears that they are tenants on the land and are not really interested in the mortgage in favour of either of the parties. They are entitled to remain on the land, unless it be found in any subsequent suit or suits that they are liable to ejectment under the Bengal Tenancy Act or any other Act that may be in force. The decree for costs passed by the lower Court as regards the defendants Nos. 3 to 45 will stand. The plaintiff appellant must pay the cost of the defendant No. 2 the respondent in this Court. We assess the hearing fee at two hundred rupees.

A. T. M.

Decree modified.

Before Mr. Justice Mitra and Mr. Justice Bell

ANANDA CHANDRA PODDAR AND OTHERS

KUNJO BEHARI PAL.

Right to sue—Incumbrances, suit to avoid—Purchaser from a purchaser at a revenue-sale—Putindar—Permanent Settlement, tenure from before—Long possession—Presumption—Direct evidence

A purchaser from a purchaser at a sale for arrears of Government revenue as well as a *putindar* are persons who can sue to avoid encumbrances or under-tenures created since the permanent settlement.

It is not necessary that direct evidence should be given to prove the existence of a tenure from before the permanent settlement in order that it might be protected from avoidance on account of sale for arrears of Government revenue. A presumption in favour of its existence arises from the proof of the existence of a tenure for a very long time, say from 1824.

Hurryhur Mookhopadhyay v. Madub Chunder Baboo (1), and *Forbes v. Meer Mahomed Hossain* (2), referred to.

Appeal by the Defendants Nos. 15 to 21.

Suit to recover possession of lands.

The facts of the case were as follows :—An estate was sold to D under the provisions of Act XI of 1859 on the 24th Septem-

* Appeal from Appellate Decree No. 2262 of 1906, against the decree of H. Walsley Esq., Officiating District Judge of Dacca, dated the 4th June 1906, reversing that of Babu Hari Nath Roy, Subordinate Judge of Dacca, dated the 22nd December 1905.

(1) (1871) 14 M. I A. 152 at 173. (2) (1873) 12 B. L. R. 210 at 215 (P.C.)

[See *Nityanund v. Banshi*, 3 C. W. N. 341—Rep.]

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ber 1894 ; shortly afterwards in Sraban 1302 (corresponding to July or August 1895), he sold the estate to R. R's sons, defendants Nos. 69 to 73, created a *putni* tenure consisting of the village G in dispute, in favour of defendants Nos. 9 and 65 to 69 on the 4th Chaitra 1307 (corresponding to 17th March 1901). Those *putnidars* failed to pay their rent and the *putni* was sold under the provisions of Regulation VIII of 1819, and bought by the plaintiff on 15th May 1903. The plaintiff as purchaser took symbolical possession through the Collector, but was unable to obtain actual *khas* possession of a tenure called Muluk Chand Lal Saran Rai. He found that a permanent tenure was put forward to bar his possession. Accordingly a suit was brought to recover possession of lands which contained mouza G. It was based on the rights given to auction-purchasers by section 37 Act XI of 1859.

The defendants set up a permanent tenure co-extensive with the mouza and existing from before the permanent settlement. Issues were raised ; the fifth being : " Do the defendants hold the disputed land under the *Shikmi* tenure Muluk Chand Lal Saran Rai ? And has that tenure existed from the time of the permanent settlement ? "

The Subordinate Judge held that the defendants had succeeded in making out a case of the existence of the tenancy from before the permanent settlement. The District Judge on appeal came to a different conclusion. After disposing of a cross-appeal preferred by the defendants (as regards a petition for adjournment to enable certain witnesses to attend) he observed as follows :—

" I now come to the plaintiff's appeal against the finding that the *shikmi* tenure has been in existence since the time of permanent settlement. Here the learned Subordinate Judge appears to overlook the fact that the burden of proving tenure to be a protected tenure is upon the tenure-holders. The finding that there is clear evidence of the existence of the tenure from before 1231. This finding is based on an '*isamnavishi n. zawari*' submitted to the Collector in that year and in that paper the tenure is mentioned by name. It is urged for the appeal that the statement in that return is not binding on him. I do not understand it to be defendant's contention that the statement is an admission which binds the plaintiff but that it affords some evidence of the existence of the tenure in the year 1231. 1231 B. S. corresponds to 1824 A. D. and I can not regard

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a return as proving that the return was in existence in 1793. The other documents are later, and do not of themselves help the defendants. In the *kobala* of 1251 the vendor Bejoy sold part of the tenure as ancestral property. Bejoy's father was Ram Krishna. An old man now eighty years old says that he saw Bejoy, but that he never saw Ram Krishna and the inference suggested is that Ram Krishna died many years before 1251, perhaps even before 1231. But granted that the old man's evidence is quite reliable it only shows that Ram Krishna was not alive in say 1240. There is only vague hearsay evidence to show that Muluk Chand and Lal Saran were the progenitors of Bejoy. I cannot regard this evidence as sufficient to bridge the gulf between 1824, the year of the *isamnavisi mouzawari*, and 1793, the year of the permanent settlement. In saying 'when there is no contrary evidence I am not willing to reject it as quite unreliable,' the learned Subordinate Judge appears to be forgetting where the *onus* lies.

I am unable to hold that the defendants have made out that their tenure is a protected tenure.....The result is that I dismiss the defendants' cross-appeal and decree the plaintiff's appeal against the contesting defendants, and *ex parte* against the other defendants, except Nos. 63 and 64 with whom a compromise was effected."

Babus Jogesh Chunder Roy and Biraj Mohun Mojumdar
(for Babu Jnanendra Nath Bose) for the Appellants.

The Advocate-General (Hon'ble Mr. S. P. Sinha) and Babu
Harendra Narayan Mitra (for Babu Basanta Coomar Bose) for the Respondent.

The judgment of the Court was delivered by

Mitra J.—The plaintiff has been found to occupy the position of a purchaser under a sale for arrears of Government Revenue of an entire estate and he has, under section 37 of Act XI of 1859, the right to avoid encumbrances or under-tenures created since the permanent settlement. The contention raised by the defendants appellants that he had not such a position cannot be entertained. A purchaser from a purchaser at a sale for arrears of Government Revenue as well as a *putnidar* have been held to be persons who could sue to avoid encumbrances or under-tenures. We are not disposed to go against this view in the presence of authorities.

The main question is whether the defendants succeeded in proving that the tenure held by them existed from before the

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time of the permanent settlement. The Subordinate Judge was of opinion that they had succeeded in making out a case of the existence of the tenancy from before the permanent settlement.

The learned District Judge, on appeal, has come to a different conclusion. He has found the following facts, namely, that the tenure must have existed in the year 1824 and that the tenure was held by the defendants and their predecessors at least from 1824. But, he says that he cannot from that fact alone come to the conclusion that the tenure was in existence in 1793. Reading his judgment, it appears to us that he did not apply his mind to the presumption which might arise in such cases. He was evidently of opinion that direct evidence must be given to prove the existence of a tenure from before the permanent settlement in order that it might be protected from avoidance on account of sale for arrears of Government revenue. He nowhere in his judgment refers to the presumption which might arise from proof of the existence of a tenure for a very long time.

In *A. G. Forbes v. Meer Mahomed Hossein* (1) which was a case of the avoidance of a tenure by an auction-purchaser at a sale for arrears of revenue, their Lordships of the Judicial Committee observed :—"The presumption in favour of an auction-purchaser is based upon the principle that every bigha of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions, and that the right of the zemindar to enhance rent is also presumable until the contrary is shown. Accordingly, in many cases, which may be found in the books, a very heavy burden of proof has been placed upon the defendants, whose tenures have been questioned by auction-purchasers ; and they have had to prove, in circumstances of great difficulty, that their tenure did really exist at the date of the perpetual settlement or even twelve years before, in order to escape the consequences of the claim." Then their Lordships added : "It is, however, to be observed that the course of modern legislation and also of modern decision, has, if not in the case of lakhiraj lands, at least in the case of under-tenants, to a considerable degree modified the rules laid down in the earlier cases, by giving force to the contrary presumptions arising from proof of long and undisturbed possession." In the case of lakhiraj tenures, it was observed by the Judicial Committee in *Hurryhur Mookhopadhyaya v. Madub Chunder Baboo* (2), "Nor is it, in their Lordship's opinion, to be regretted

(1) (1878) 12 B. L. R. 210 (P.C.) at 215. (2) (1871) 14 M. L. A. 152 at 173.

if, in such cases, effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption suits under the Regulations, which have now been decided to be inapplicable to suits of this nature, and relieving defendants from a burthen which every year made it more difficult to support." In fact, the legislature found even in the year 1825 that it was necessary to give effect to a contrary presumption arising from long possession. That would appear from Regulation XIV passed in that year. The learned District Judge should have considered whether, having regard to the other facts of the case and the proof of the existence of the tenure in 1824, he could, as a Judge of facts, come to the conclusion that the tenure had existed from before the permanent settlement.

We are, therefore, of opinion that this case should go back to the learned District Judge in order that he may reconsider his judgment with reference to the observations made by us.

Costs will abide the result.

A. T. M.

Appeal decreed, case remanded.

Before Mr. Justice Mitra and Mr. Justice Bell.

PEARY MOHUN ROY

v.

KHELARAM SARKAR AND ANOTHER.

Meane profits, suit for—Limitation Act, Schedule II Arts. 109, 120 applicability of—when the profits are received—in Art. 109, meaning of.

Where the defendants wrongfully received profits which were actually receivable by the plaintiff but for an illegal *putni* sale which was afterwards set aside, the period of limitation is three years from the time when the profits were received.

By the clause "where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession" in the third column of article 109, the Legislature limits the conditions under which the ordinary rule of three years may be extended.

The clause "when the profits are received" in the third column of article 109 means "when the profits are actually received."

Dhanput Singh v. Saraswati Mirrai (1), explained.

Krishnanand v. Kunwar Patab Narain Singh (2), referred to.

* Appeal from Appellate Decree No. 1480 of 1906 preferred on the 20th August 1906, against the decree of S B Chowdhry Esq., District Judge, Hughly, dated the 22nd May 1906, affirming that of Babu Dinanath Sarkar, Subordinate Judge, Hughly, dated 31st May 1905.

(1) (1891) I L R. 19 Calo. 267. (2) (1884) I L R. 10 Calo. 785 (P. C.)

[See *E. H. Holloway v. Guneswar Singh* (1905) 3 C. L. J. 182, where the contrary view appears to have been taken].

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Barry Mohun Roy
v.
Chelaram Sarkar.

Appeal by the Defendant No. 1.

The plaintiff was the owner of a *putni* mehal under the Maharaja of Burdwan. The mehal was sold under Regulation VIII of 1819 for arrears of rent for the year 1306 and was purchased by the first defendant on the 18th May 1900 and he afterwards transferred it to his wife, the second defendant. The plaintiff instituted a suit for setting aside the *putni* sale and obtained a decree for possession on the 27th February 1901. He took possession on the 11th September 1901. The defendants were in possession of the property from 18th May 1901 to 11th September 1901. The present suit for mesne profits was instituted by the plaintiff on the 6th April 1904.

The question argued in all the Courts was whether the claim for mesne profits for the period before three years of the institution of the suit, that is, the period from 18th May 1901 to 5th April 1904 was barred by limitation.

Both the lower Courts were of opinion that Art. 120 of the second schedule of the Limitation Act applied to the case and not Art. 109 of the same schedule as contended for by the defendants.

The defendant No. 1 preferred this second appeal. The plaintiff was the respondent No. 1 and the defendant No. 2 was the respondent No. 2.

Dr. Rash Behary Ghosh (with him *Babu Hari Charan Sarkhel*) for the Appellant.

When no other article is applicable to a case, then only the aid of Art. 120 is to be invoked. Art. 109 is an express provision for suits for mesne profits. The words "wrongfully received" in the first column of Art. 109 do not mean "dishonestly received." Surely my client did not rightfully receive the profits. The plaintiff is on the horns of a dilemma. If my client did not wrongfully receive the profits, then there is no cause of action and the whole claim fails. If the reception is wrongful, the suit cannot but come under Art. 109. Legislature provides for dispossession in execution of a decree. If the lower Court is right, the last clause in the third column of Art. 109 has no meaning.

Byjnath Pershad v. Badhoo Singh (1) and *Krishnanand v. Kunwar Pertab Naram Singh* (2) referred to.

You cannot extend limitation by analogy. Refers to *Mitra*'

Limitation pages 925 and 926. Hard cases have a well-known tendency. They are a source of good deal of bad law.

Dhunput Singh v. Saraswati Misra (1), has no bearing to the facts of the present case.

Babu Nilmadhub Bose (with him *Babu Surendra Nath Guha*) for the Respondent No. 1.

The word "wrongfully" in the first column of Art 109 means "dishonestly". It means "morally wrongful."

Babu Atul Krishna Roy for the Respondent No. 2.

The judgment of the Court was delivered by

Mitra J.—The plaintiff was the owner of a *putni* mehal under the Moharaja of Burdwan. The mehal was sold under Regulation VIII of 1819 for arrears of rent for the year 1306 and was purchased by the first defendant. The sale took place on the 18th May 1900. Afterwards, the first defendant transferred the property to the second defendant, his wife. The plaintiff instituted a suit (No. 64 of 1900) for setting aside the *putni* sale and obtained a decree for possession on the 27th February 1901. He took possession on the 11th September 1901. During the period between the 18th May 1900 and the 11th September 1901, the defendants, or either of them, were in possession of the *putni* property. The plaintiff instituted the present suit for mesne profits for the period that the defendants were in possession, namely, from 18th May 1900 to 11th September 1901.

It is admitted that the claim for the amount, if any, recovered by the defendants or either of them within three years of 6th April 1904 (the date of the institution of the suit) is not barred by limitation.

The question argued in the lower Courts and also before us is whether the claim for mesne profits for the period before three years of the institution of the suit, *i. e.* the period from 18th May 1900 to 5th April 1901 is barred by limitation. The lower Courts were of opinion that Art. 120 of the second schedule of the Limitation Act applied to the case and not Art. 109 of the same schedule, as contended for by the defendants. In support of the view which the lower Courts took, they relied on the decision of this Court in *Dhunput Singh v. Saraswati Misra* (1). That was, however, a case not for mesne profits but for rent and the question raised in it was whether the plaintiff who was the landlord and, was in possession, having himself purchased at the sale under the *putni* Regulation, could sue for rent for the

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period during which he was in possession. The answer was that the plaintiff was not a trespasser within the meaning of the rule that a landlord who causes trespass on the land of his tenant is not entitled to rent for the period of his trespass. All that the Court held in that case was that it was not a trespass of that kind, that the case was distinguishable and that the plaintiff would be entitled to recover rent after giving credit for the amount, if any, that he actually recovered from the tenants in occupation.

Art. 109 of the second Schedule of the Limitation Act is clear in its terms. It relates to the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant. In the present case, there can be no doubt that the defendants or either of them wrongfully received profits which were actually receivable by the plaintiff but for the illegal *putni* sale which was afterwards set aside. The period of limitation is three years and it runs from the time when the profits were received. No question arises on the words of the article when the cause of action arose. The words "cause of action" are not used. That the view we take is correct is clear from the words which follow, in the third column namely, "where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession." The legislature limits the conditions under which the period of three years may be extended. If a person takes possession in execution of his decree and the defendant afterwards succeeds in getting the decree of the first Court set aside on appeal and then retakes possession, his right to sue for mesne profits accrues from the date when he gets a decree from the appellate Court. That case is excepted from the ordinary rule. No other case is excepted. We must, therefore, construe the words "when the profits are received" as meaning when the profits are *actually* received. We do not see our way of getting over a construction which is patent from the words used in Art 109. Art. 120 does not, therefore, apply but Art 109 is clearly applicable.

In *Krishnanund v. Kunwar Pertab Narain Singh* (1), a contention similar to the one before us was raised before the Judicial Committee of the Privy Council. It was contended that, when the settlement officer gave possession to a person, the possession was not that of a trespasser and it was not wrongful within the meaning of Art 109. The Judicial Committee observed

(1) (1884) I L. R. 10 Calc. 785, (P. C.)

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quoting the words of Art. 109, that the argument could not be supported and the point was practically abandoned by the learned Counsel who argued the case. We are, therefore, of opinion that the decree of the lower appellate Court should be set aside.

But then remains the question whether we should remand the case for a finding as to the amount payable by the defendants to the plaintiff for the period between the 6th April 1901 and the 11th September 1901. It appears from the commissioner's report that the sum of Rs. 377-7-8 was realized by one Jadab as *gomastha* of the defendants for the period from *Falgun* 1307 to 31st *Sraban* 1308. It does not appear that the defendants or any of them realized any further sum. The liability of the defendants would be less than the sum of Rs. 377-7-8. But the learned Counsel for the defendants has no objection to a decree being passed in favour of the plaintiff for this sum preferring it to the harassment of a continuation of the litigation for a smaller amount. We, therefore, direct that, in lieu of the decree passed by the lower appellate Court, a decree be entered in favour of the plaintiff for the sum of Rs. 377-7-8. We direct that the appellant do get the costs of this appeal as well as the costs incurred by him in the lower Courts in proportion to the claim dismissed.

Decree modified.

Before Mr. Justice Brett and Mr. Justice Coxe.

SONABHAN BIBI AND ANOTHER

v.

NATHMAL KERASI AND OTHERS.*

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June, 15.

Declaration, right to—Rights in property affected—Subsequent conduct of defaulter.

Where one of the shareholders of a property purported to mortgage the whole estate,

Held, the other shareholders had a right to the declaration that the defendant could not alienate their share, and this, notwithstanding that subsequently to the suit the defaulter had paid off the mortgage debt.

Appeal by the Plaintiffs.

Suit for a declaration.

The material facts and arguments appear from the judgment.

Babu Dwarka Nath Mitter for the Appellants.

Babu Shorashi Charan Mitra for the Respondent.

* Appeal from Original Decree No. 131 of 1906, against the decision of G. N. Roy Esq., Officiating District Judge of Dinajpore dated the 23rd January 1906.

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Sonabhan Bibi
v.
Nathmal Kerasi.

The following judgment was delivered :—

The plaintiffs and defendants in the present suit with the exception of defendant No. 1, are the descendants of one Ethaloo Mandal. The plaintiffs claimed to be entitled to certain shares in a 3 annas 8 gundas share, which Ethaloo had in a zemindari called Dipkhanda and also certain shares in the whole of a *putni* called Darail Hat which also belonged to Ethaloo.

The case for the plaintiffs was that defendant No. 2, who, as one of the descendants of Ethaloo, had also a share in the zemindari and a share in the *putni* left by him, on the 1st Agrahan 1306 (*i. e.* November 1899) executed a mortgage deed in favour of defendant No. 1, by which he hypothecated a 3 annas 8 gundas share in the zemindari and an 8 annas share in the *putni* as security for the mortgage loan. The plaintiffs' allegation was that this mortgage was executed without their knowledge and that they were only informed that such a transaction had taken place when on the 18th April 1904, a proclamation of sale of the mortgaged properties was published.

It seems that defendant No. 1 brought a suit on the mortgage to recover his debt and obtained a decree, and in execution of the decree he applied that the mortgaged properties should be sold. The plaintiffs on receiving intimation that their properties were to be sold on the 6th June 1904 in satisfaction of the mortgage debt, instituted the present suit on the 21st May 1904. In this suit they sought to have it declared that they were entitled to certain shares in the zemindari and *putni* and for an adjudication that the defendant No. 2 had no right to mortgage to defendant No. 1, their shares amounting to 1 anna 15 gundas 1 krant in the zemindari and 5 annas 14 gundas 2 krants in the *putni* and that the shares were not liable to be sold in execution of the decree obtained by defendant No. 1, and for an injunction restraining defendant No. 1 from selling the shares in execution of the decree.

It appears that after the institution of this suit and the issue of a temporary injunction restraining defendant No. 1 from selling the shares of the plaintiffs in execution of the mortgage decree, that the defendant No. 1 put up the shares of defendant No. 2 for sale and himself purchased them. Thereafter defendant No. 2 paid up the full amount of the debt due on the mortgage and the Court set aside the sale. When this suit came on for hearing before the District Judge the defence that was taken was that as subsequent to the institution of the suit the mortgage

debt had been paid off and there was no risk of the sale of the shares of the plaintiffs in execution of the decree, therefore the plaintiffs were not entitled to obtain any relief in the suit.

The District Judge accepted that contention and held that the suit of the plaintiffs could not proceed further and dismissed it. At the same time the judge passed an order directing that the plaintiffs should recover the full costs from defendant No. 2 on the finding that the defendants had fraudulently included the shares of the plaintiffs in the mortgage executed by him.

The plaintiffs have appealed and the only question urged before us is whether the District Judge is right in the view which he has taken that the plaintiffs were not entitled to the relief which they sought namely for a decree declaring their title to the shares which they claimed in the zemindari and *putni*.

After hearing the learned vakils on both sides we are of opinion that the learned District Judge was not right in the view which he took. No doubt, the plaintiffs in the plaint have stated that their cause of action for the suit arose on the 18th April 1904 when they became aware that their properties were notified for sale in execution of the mortgage decree. But in fact the cause of action against defendant No. 2 appears to have arisen when that defendant in November 1899 infringed the rights which the plaintiffs claimed in the properties by mortgaging their shares together with his own share, as being his own properties, to defendant No. 1. The subsequent suit and the sale in satisfaction of the decree were in consequence arising out of the original act of the defendant by which he infringed the right of the plaintiffs. We are unable to agree with the learned District Judge that after the discharge of the mortgage debt by defendant No. 2 after the institution of the present suit, the plaintiffs lost all rights to the declaratory decree which they claimed on the ground that the defendant No. 2 had fraudulently dealt with their properties in infringement of their title.

We think, therefore, that the judgment and decree of the District Judge by which he dismissed the suit on the preliminary point cannot be maintained; that ground being that as the mortgage debt was paid off, therefore the plaintiffs were entitled to no other relief. We do not think that that view is correct and we hold that the act of defendant No. 2 having been an act in infringement of the rights claimed by the plaintiffs in the zemindari and *putni*, the plaintiffs are entitled to a decree declaring their rights to their shares in the zemindari and *putni*.

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so as to protect their rights from any future infringement by the defendants.

We therefore set aside the judgment and decree of the lower Court and direct that the case be sent back to that Court for trial on the merits and for determination of what shares in the zemindari and *putni* the plaintiffs are entitled to, and after ascertaining those facts for passing a declaratory decree in favour of the plaintiffs.

Costs will abide the result, the hearing fee in this appeal being assessed at five gold mohurs.

N. K. B.

*Appeal allowed ; case remanded.**Before Mr. Justice Stephen and Mr. Justice Holmwood.*

DHARANI KANTA LAHIRI CHAUDHURI

v,

SHIBA SUNDARI DEBYA AND OTHERS.*

Grant—Construction of—Forfeiture—Right of re-entry.

T granted a *miras taluq* to his widowed daughter at a rent, for her life, and on her death, to her adopted son, if she adopted one, for life, and after him to his sons, grandsons &c., by right of inheritance, in the male line, but without any power of alienating the property. In case the grantee adopted no son or her adopted son died without any heir in the male line the property was to revert to the grantor or his representative. It was also provided that the property could not be attached or sold for any debt incurred by the grantee or her adopted son, grandson &c. In case of attachment or sale, it would be void and the property would come into the *khas* possession of the grantor or his representative :

Held, the grant did not create an absolute estate in the daughter. At the same time the grantor had no right to re-enter in case of a voluntary alienation. That right was limited to case of attachment or sale.

When therefore the grantee made a gift of the property to her adopted son,

Held, the gift was void, but the grantor or his representative could not obtain *khas* possession of the property.

Appeal by the Plaintiff.

Suit for possession after declaration of forfeiture.

The facts and circumstances appear sufficiently from the judgment.

Mr. S. P. Sinha (Advocate-General) and Babus Jogesh Chandra Roy and Rajendra Chandra Guha for the Appellant.

Babus Dwarkanath Chakravarti and Mohini Mohun Chatterjee for the Respondents.

C. A. V.

* Appeal from Original Decree No. 95 of 1906 against the decision of Babu Ananda Nath Majumdar, Subordinate Judge of Mymensingh, dated the 22nd November 1905.

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The judgment of the Court was as follows :—

Stephen J.—The facts of this case are as follows. In 1874 one Tarini Kanta Lahiri Chaudhuri granted a *miras* taluk to his widowed daughter Srimati Shiba Sundari Debya at a rent of Rs. 77. The demise was to her for life; on her death to her adopted son, if she adopted one, for life, on his death "to his sons, grandsons &c.," by right of inheritance in the male line, without any power of disposing of the property at will, by gift, sale &c. If the grantee did not adopt a son, or if she adopted, and the son died without any son, grandson &c., the property was to revert to the grantor or his representative. It was also provided that "the said property can not be attached or sold for any debt incurred by you or by your adopted son or grandson &c." If it be attached or sold (this seems a correcter translation than the official one) it (*i. e.* this grant) will at once become null and void, and the property will come into khas possession of one or all of my representatives." What happened was that Tarini adopted a son Dwigenrda Nath Sanyal, defendant No. 2, a fact that was disputed in the lower Court, but was not called in question before us, and made a gift of the land to him by a deed dated the 7th September 1901, reciting that he was taking care of her, and that she was far advanced in years and not sufficiently strong to manage and protect the properties and therefore intended to pass her days in devotion

The plaintiff is the legal representative of Tarini Kanta and sues to have it declared that the conveyance of defendant No. 1 to defendant No. 2 is invalid, and for possession of the property on the ground that the conveyance has operated as a forfeiture. The lower Court has declared the alienation in favour of defendant No. 2. invalid as against the plaintiff; but has dismissed the suit so far as the claim for possession and consequential relief is concerned.

Against this decision the plaintiff has appealed and the only question that has been raised before us is whether under the terms of Tarini's pattah to Defendant No. 1, the property reverts to the plaintiff as Tarini's representative. The lower Court, it is true, held that the prayer for ejectment might be considered to be time-barred under Art. I of schedule III of the Bengal Tenancy Act by force of section 184 of the Act. No doubt this might apply if the plaintiff had any remedy by ejectment in respect of the breach of the grantee's covenant not voluntarily to alienate, but in the view we take there is no right of ejectment

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at all, only a right of re-entry in the event of the grantee being ejected by other persons. Besides the plaintiff seeks to eject the adopted son with whom he has no contract and not the grantee.

As to the effect of Tarini's potta of 1874 the effect of which is reproduced in the kabulyat of defendant No. 1 of the same date, we find that the words of inheritance contained in the grant do not create an absolute estate in favour of the grantee. The natural heirs of defendant No. 1 and the female heirs of defendant No. 2 are both excluded; if the defendant No. 1 did not adopt a son, or if she adopted a son and he predeceased her without having a son, grandson &c., she took only a life estate; and if the property was attached or sold while in No. 1's hands at any rate, the property reverted to the grantor and his representatives. These provisions were ample to prevent the creation of an absolute estate in favour of No. 1. We must hold therefore that No. 1 took a life estate with a reversion to her adopted son and others; and the question is whether this estate has been forfeited so as to entitle the plaintiff to re-enter.

Now the only right of re-entry expressly mentioned in the pottah is conferred by the provisions to which we have referred, which according to the terms of the pottah as translated, and still more the same terms as we consider they should be translated, seems to refer only to the property being attached or sold for debt. But it is argued on behalf of the plaintiff appellant, that if we consider the whole scope and purpose of the transaction in question the provision against voluntary alienation was a condition of the grant, and not a mere covenant. The pottah was dated before the commencement of the Transfer of Property Act 1882; but the appellant contends that in looking at the purpose of the grant we should act on the principles laid down in sections 11 and 111 of that Act, after having come to the conclusion on the facts of the case that the grantor intended to retain a right of the re-entry on a breach of the restriction against voluntary alienation. The main purpose of the grantor was it is admitted to provide for the maintenance of his daughter for her life, with a remainder to her adopted son. To effect this he not only made any alienation by her void, but intended to make it confer a right of re-entry on himself, so that though she might be bound by it, he would still have the power to recover the property for her use if he so saw fit. To us the facts seem to point the other way. An alienation by the grantee was made void which in itself probably provides a better protection of the

grantee's interest than would be afforded by the re-entry of the grantor or his representatives; but it was only in the case of an involuntary sale in execution of a decree and so on that a re-entry was provided for; and then only because it would be better for the grantee that the property should go to a member of her family than to a creditor.

The construction of the pottah must of course be determined without reference to subsequent events; but it is obvious that if the plaintiff succeeds in establishing his right to re-entry, the purpose for which the pottah was created will be defeated, while if he fails it will be exactly carried out, as defendant No. 1 is at present maintained by defendant No. 2 and she conveyed the property to him after having held it herself for twenty seven years because of the infirmities of old age. This fact has led the advocate for the respondent to suggest that the alienation by defendant No. 1 to defendant No. 2 is good in view of the right of a Hindu widow to surrender her estate to the reversioner as though she had died.

In this case however the defendant No. 1 neither held nor transferred the property as a Hindu widow and we know of no ground for extending the principle in question to a lessee.

The alienation by defendant No. 1 to defendant No. 2 being directly contrary to the provisions of the pottah we agree with the lower Court in holding that the transfer was bad. But we consider that the breach of the provisions can not operate as a forfeiture. The result is that the appeal is dismissed with costs.

There is a cross appeal against the decision of the lower Court in so far as it declares the transfer by defendant No. 1 to defendant No. 2 to be invalid, as against the plaintiff. From what we have said in the judgment on the appeal, the cross appeal must also be dismissed. We make no order as to costs in this.

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Dharani Kanta
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Stephen, J.

CIVIL RULE.

CIVIL.

1908.

May, 4.

Before Mr. Justice Mitra and Mr. Justice Bell.

RIVERS STEAM NAVIGATION Co. LTD.,

v.

KASHI PRASAD AND ANOTHER.*

Common Carriers Act (III of 1865), amended by Act X of 1899, Sec 10—Steamship Company and Railway Company—Notice before suit.

Section 10 of the Common Carriers Act as amended by Act X of 1899 placed a Steamship Company in the same position as a railway, and make it obligatory upon a person wanting to sue a Steamer Company to give notice of such suit within the time mentioned in the section.

Rule obtained by the Defendant.

Suit for damages.

The facts necessary for this report appear from the judgment.

Babu Manmatha Nath Mukherji for the Petitioner.

No one for the Opposite Party.

The following judgment was delivered :—

Mitra J.—This is a Rule issued on the opposite party, the plaintiff in the case, to show cause why the decree of the lower Court complained of in the petition should not be set aside. The main ground on which the Rule was issued was that it was necessary before the institution of the suit that notice should be given as provided by section 2 of Act X of 1899. The common carriers Act of 1865 was amended by Act X of 1899 and section 10 as amended runs thus :—"No suit shall be instituted against a common carrier for the loss or injury to goods entrusted to him for carriage unless notice is given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff." The lower Court seems to think that no notice was necessary because a Steam Navigation Company does not stand on the same footing as a Railway Company under the Indian Railways Act. But the amendment of section 10 of the Common Carriers Act puts a Navigation Company in practically the same footing as a Railway Company. The notice, therefore, was necessary and the only question is was the notice alleged to have been given to the defendant in the case a proper notice. Now, the plaint does not say that any notice was given to the petitioner Company. An attempt was made to show by evidence that some sort of

* Civil Rule No. 2131 of 1907 against the decision of Babu Jadunandan Prasad, Munsiff and Small Cause Court Judge, Patna, dated the 17th April 1907.

notice was given. The Munsiff has relied on the statement of a witness in the witness box. All that he says is that a letter was written to the office of the defendant at Debrughur. What the contents of that letter were, whether it was in proper form or not and whether it was addressed to the agent of the petitioner Company do not appear. We can not accept the deposition of this witness as sufficient to show that the notice was in proper form and was really served on the defendant.

The action, therefore, must fail and we direct that the Rule be made absolute and the suit be dismissed with costs. The petitioner is entitled to his costs in the Court. We assess the hearing fee at one gold mohur.

N. K. B.

Rule made absolute.

APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

UMED ALI

v.

ABDUL KARIM *

CIVIL.

1908.

July, 13, 16.

Application for time—Step in aid of execution—Previous application barred—Notice on judgment-debtor—Estoppel.

An application for time is not a step in aid of execution and does not present subsequent applications from being barred.

Kartick v. Juggernath (1), and *Hira Lal v. Dwija Charan Bose* (2), followed.

A judgment-debtor is not estopped from contending that a previous application for execution was barred by limitation merely because notice had been served on him and he did not appear to contest the proceedings.

Mungul Pershad v. Grija Kant (3), and *Norendra v. Bhupendra* (4), distinguished.

Appeal by the judgment-debtor.

Application for execution of decree.

The facts and arguments appear from the judgment.

Dr. Priya Nath Sen for the Appellant.

Moulvie Nuruddin Ahmed for the Respondent.

C. A. V.

The following judgment was delivered:—

This is an appeal against an order of the District Judge of Noakhali affirming the order of the Munsiff rejecting the

July, 16.

* Appeal from Order No. 527 of 1907 against the decision of Mr. Yusuf Ali, District Judge of Noakhali, dated the 16th September 1907, affirming that of Babu Atul Chandra Das Gupta, Munsiff, Sudharam, dated the 5th August 1907.

(1) (1899) 1 L. R. 27 Cal. 285.

(3) (1881) 1 L. R. 8 Cal. 51.

(2) (1906) 3 C. L. J. 240

(4) (1895) 1 L. R. 23 Cal. 374.

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1908.

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appellant judgment debtor's application for a declaration that the decree-holder's fifth application for execution is barred by limitation.

The dates necessary for a determination of this question are given below : first application for execution—28th November 1901, notice served—6th December 1901. Time allowed to decree-holder—21st December 1901 ; dismissed for default—4th January 1902. Second application—13th December 1904. Notice served—24th December 1904 ; dismissed for default—14th February 1905. There was a 3rd and 4th petition on the 25th June 1906 and 14th July 1906 respectively which were also dismissed for default and the present application is dated 9th April 1907. Upon these dates as they stand the application of the 13th December 1904 was barred and therefore the subsequent applications would also be barred.

Two grounds were however urged by the decree-holder in the lower Courts for holding that the execution was not barred. First that the application for time on the 21st December 1901 was a step in aid of execution ; secondly, that the judgment-debtor was estopped by his conduct in not objecting to the subsequent execution proceedings of which he got notice.

The Munsiff held that the first ground was untenable as the order for time was not a step in aid of execution, inasmuch as it was not shown that the decree-holder had applied either by petition or orally for time.

He however found that the judgment debtor could not now question the validity of the execution case of 1904 inasmuch as notice was served upon him and he did not appear to contest the execution proceedings.

On appeal the learned District Judge held that there could be no estoppel inasmuch as the rule laid down in *Mungul Pershad Ditchit's* case (1) did not apply to this case. He however held that the order of the Court to the decree-holder to take steps which was passed on the 21st December 1901 must have been based on some application of the decree-holder and that as his application for time was granted, the order must be taken to be a step in aid of execution. He therefore dismissed the judgment-debtor's appeal. The learned Judge does not seem to have had before him the authorities in the rulings of this Court which have decided that an application for time is not a step in aid of execution. In the case of *Kartick Nath Pandey v.*

Juggernath Ram Marwari (1) it was held that an application for time is not a step in aid of execution and this whether it was allowed or disallowed and in a subsequent case of *Hira Lal Bose v. Dwija Charan Bose* (2), this view was approved by Mookerjee J. The ground therefore on which the learned Judge has dismissed the judgment-debtor's appeal is unsound and must be set aside. But we are asked to restore the Munsiff's finding on the authority of the well known case before the Judicial Committee of *Mungul Pershad Ditchit* (3). It is only necessary to point out that in that case an order for attachment made by the Subordinate Judge on an application which would otherwise have been time-barred was held to operate as a decision that the execution was not barred, even though that decision was erroneous, but at the same time their Lordships of the Judicial Committee declined to differ from the rule laid down by the Full Bench in *Bisseshur Mullick v. Maharaja Mahatab Chunder* (4) in which it was held that the mere service of notice on the judgment-debtor after the decree was barred was not a proceeding in execution merely because the judgment-debtor did not come in and oppose it. The case of *Mungul Pershad Ditchit* (3) is therefore no authority for the view taken by the learned Munsiff still less so in the other case on which he relies viz. the case of *Norendia Nath Pahari v. Bhupendra Narain Roy* (5), inasmuch as in that case four valid grounds for saving limitation were established namely (a) an acknowledgment of liability, (b) a deposit of process fees for sale proclamation, (c) the registration of the application and attachment ordered thereon, (d) the minority of the decree-holder.

We are, therefore, of opinion that both the grounds urged by the respondent in this case fail and that the appeal must be decreed, but under the circumstances without costs.

N. K. B.

Appeal allowed.

(1) (1899) I. L. R. 27 Calc. 285

(2) (1905) 3 C L. J. 240 at 246.

(3) (1881) I. L. R. 8 Calc 51.

(4) (1868) 10 W. R. F. B. 8.

(5) (1895) I. L. R. 23 Calc. 374.

CIVIL.
1908.
Umed Ali
v.
Abdul Karim.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

SATISH CHANDRA MULLICK

v.

ASHRUFFUDIN AHMAD AND OTHERS.*

CIVIL.

1908.

May, 18.

Mutwalli, whether infant can be appointed—Waver—Civil Procedure Code (XIV of 1882), Sec. 44(a), leave under.

The power to appoint a *mutwalli* is a power in the nature of a trust. The power to appoint a new *mutwalli* stands on the same ground as the power to appoint new trustees in England.

A person who is below the age of puberty cannot be appointed *mutwalli*. *Piran v. Abdul Karim* (1) followed.

In a suit by a purchaser for a declaratory decree where a *wakf* is set up by the defendant who claims the land as the *mutwalli* but fails to establish his title, if the plaintiff has made out a *prima facie* title, he is entitled to a declaration of his title and an injunction. *Ismail Ariff v. Mahomed Ghous* (2) followed.

Section 44(a) of the Civil Procedure Code substantially follows one of the rules (O. XVIII, r 2) of the Supreme Court in England and was intended for the protection of the defendant. The defendant may by his conduct waive the benefit of that rule.

Lloyd v. Great Western &c. Dairies Co., Ltd. (3) followed.

This was a suit by the plaintiff for a declaration of his title to certain lands which had been encroached upon by a predecessor in title of one of the defendants. The plaint also contained a prayer for "a decree ordering the defendants to give up vacant possession of the land to the plaintiff and to pay mesne profits &c." There were three defendants. The plaintiff claimed his title through the second defendant who was the wife of the first defendant. The third defendant who was an infant daughter of the other two defendants contended that the land in suit was a part of a *wakf* property of which she was a *mutwalli*. There had been some litigation between the parties but the facts necessary for this report are set out in the judgment.

Mr. B. C. Mitter (with Mr. A. Rasul) for the plaintiff.—The real question before the Court is whether the third defendant can claim the land as a *mutwalli*. She is admittedly a minor and as such her appointment as *mutwalli*, even if made, could not have been a valid appointment. See *Piran v. Abdul*

* O. C. No 287 of 1907.

(1) (1891) 1 L. R. 19 Calc. 208. (219, 220).

(2) (1892) 1 L. R. 20 Calc. 834, P. C.

(3) (1907) 23 T. L. R. 570 C. A.

Karim (1). See also Amir Ali's Mahomedan Law Vol. I, p, 350. The plaintiff is entitled to a declaratory decree, see *Ismail Ariff v. Mahomed Ghous* (2).

Mr. C. R. Das (with him **Mr. C. C. Ghose**) for the infant defendant.—The plaint does not disclose a cause of action. We are entitled to know the date of the cause of action, see section 50, Civil Procedure Code, *Ram Prosad v. Sachi Dassie* (3); the suit is not maintainable as the boundaries are not given, *Mohammad Ismail v. Lalla Dhundhar* (4). The suit is for recovery of land, see the prayer in the plaint. See *Gledhill v. Hunter* (5). The onus is on the plaintiff to prove possession within the period of limitation, *Gossain Das v. Seero Koomari* (6), *Maharajah Koorwar Babu Nitrasar Singh v. Babu Nanda Lal Singh* (7), *Jugendra Nath Rai v. Baldev Das Marwari* (8). The suit is barred by limitation, see *Shaikh Idarus v. Abdul Rohimun* (9), *Juggutmohune v. Sokhee Moni* (10). No leave under Rule (a) of section 45, Civil Procedure Code, was obtained and therefore the suit is not maintainable. *Dhondiba Krishnaji v. Ram Chandra* (11), *Maula v. Gulzar Singh* (12), *Kishna Ram v. Rakmini Sewak* (13), the former decree was an *ex parte* one and should not be held to act as *res judicata*. *Madhu Sudan Saha v. Brac* (14), *Ganga Ram v. Khem Narain* (15), *Gobind Chunder Addya v. Afzal Rubban* (16).

The judgment was as follows :—

Fletcher J.—This is a suit brought by a person to establish his title to a piece of land against the three defendants.

The way the title to this property arises is as follows :—

In certain partition proceedings had in this Court the defendant Hingun Bibee was allotted a plot of land which is marked B on the plan annexed to the plaint and it is in respect of the encroachment on this plot that this suit is brought.

It is hardly necessary for me to go fully into the details of the plaintiff's title but it will be sufficient to say that he claims through the defendant Hingun Bibee. His title arises by purchase in execution of a mortgage decree against Hingun Bibee of the plot which was allotted in the partition proceedings.

(1) (1891) I. L. R. 19 Calc. 203, (219, 220).

(2) (1892) I. L. R. 20 Calc. 834, P. C. (839, 842).

(3) (1902) 6 C. W. N. 585.

(4) (1875) 25 W. R. 39.

(5) (1880) 14 Ch. D. 492, (50J).

(6) (1873) 19 W. R. 192, 193.

(7) (1860) 8 M. I. A. 199, 213, P. C.

(13) (1887) I. L. R. 9 All. 221.

(14) (1889) I. L. R. 16 Calc. 300 F. B., (304).

(15) (1869) 11 W. R. 260.

(8) (1907) 6 C. L. J. 735.

(9) (1891) I. L. R. 16 Bom. 303.

(10) (1871) 10 B. L. R. 19 P. C.

(11) (1881) I. L. R. 5 Bom. 554.

(12) (1893) I. L. R. 16 All. 130.

(16) (1882) I. L. R. 9 Calc. 426.

CIVIL.

1908.

Satish Chandra
Mullick

Ashrafuddin Ahmad.

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Fletcher, J.

The other two defendants are her husband and her infant daughter aged 9 years.

The defence to the suit is that the property is *wakf* property having been dedicated to religious purposes by a deed of endowment dated the 17th January 1840 and that such property was not and could not have been acquired by the plaintiff.

As against Hingun Bibee and her husband there was much previous litigation in this Court on the same issue between the parties, and so far as they are concerned, they must be taken to be bound by the result of the previous litigation.

Therefore the issue as to whether this property is *wakf* or not, is not open to the first two defendants.

The only defence that remains to be considered is that taken by the infant daughter Mariam Bibee who says she derives her powers from a deed by which she was appointed *mutwalli* of the *wakf* property. It is admitted that Mariam Bibee was five years of age when she was alleged to be appointed *mutwalli* in place of Hingun who was removed for mal-administration of the trust. The question is, is that a proper appointment? The power to appoint a *mutwalli* is a power in the nature of a trust. It has to be exercised with due regard to the trust. The power to appoint a new *mutwalli* stands on the same ground as the law in appointing new trustees in England.

On the authority cited by Mr. Mitter *viz.*, the decision in the case of *Piran v. Abdul Karim* (1), it is clear that a person cannot be appointed *mutwalli* who is below the age of puberty. That being so, the only question is, is the plaintiff entitled to a declaration of his right to this property? I think there cannot be any doubt but that he is entitled to such a declaration and on this point reference may be made to the decision of the Privy Council in the case of *Ismail Ariff v. Mahomed Ghous* (2), which is a clear decision on that point, where it was held that in a suit by a purchaser for a declaratory decree where a *wakf* is set up by the defendant who claims the land as the *mutwalli* but fails to establish his title, and if the plaintiff has made out a *prima facie* title, he is entitled to a declaration of his title to the land and an injunction.

That being so, it follows in my opinion that the plaintiff is entitled to a declaration of title to the piece of land alleged to be encroached upon and to an injunction restraining the defen-

(1) (1891) 1 L. R. 19 Calo 203 (219). (2) (1892) 1 L. R. 20 Calo. 834.

dants or any of them from interfering with the plaintiff's rights thereto.

The defendant must pay the costs of the plaintiff on scale No. 2 including reserved costs.

Mr. Doss.—I wish it to be noted that the other points which I have urged have not been taken into consideration in the judgment.

The Court.—I have listened to them. I will deal with them separately if you wish.

It has been urged by Mr. Doss that this suit must fail inasmuch as leave under section 44 (a) of the Code has not been taken to the joining of several causes of action.

That section says that no cause of action shall, unless with leave of the Court, be joined with a suit for recovery of immovable property or to obtain a declaration of title to immovable property except in certain specified cases of claim mentioned therein.

It is said in this case that the relief claimed by the plaintiff is both recovery of immovable property and a declaration of title. Looking at the prayer of the plaint, it would appear to me that *prima facie* leave ought to have been obtained to sue. It is said that the claim so far as it relates to recover immovable property has not been made against the person in actual possession of the same. In my opinion section 44 which substantially follows one of the Rules of the Supreme Court in England was inserted in the Civil Procedure Code for the protection of the defendant and it has been held by Lord Justice Fletcher Moulton in the case of *Lloyd v. Great Western and Metropolitan Dairies Co. Ltd. and another* (1), that the defendant may by his conduct waive the benefit of that rule. In my opinion the defendant not having taken this objection until the trial, has waived any right she may have had to object to the suit. In my opinion, therefore, the objection as to the form of the action fails.

As regards the objection on the ground of limitation, I do not think it necessary to deal with it separately as symbolical possession was delivered to the plaintiff.

S. C. R.

Mr. H. N. Dutt.—Attorney for the Plaintiff.

Messrs. B. N. Bose & Co.—Attorneys for the Defendants.

CIVIL.

1908.

Satish Chandra
Mullick

Ashruffudin Ahmad.

Before Mr. Justice Brett, Mr. Justice Mitra and Mr. Justice Cox. ^c

PROSUNNA KUMAR BOSE

v.

SARAT SASHI GHOSE AND OTHERS*.

CIVIL.

1908.

June, 3, 4.
July, 2, 18, 27.

Stridhan, Pitridatta ayautuka, succession to—Ayautuka stridhan—Dayabhaga, Chap. IV, Sec. II, para. 16—'Kanya,' meaning of—Sons or married daughters, preferable heirs.

*Per Brett and Mitra JJ. (Cox J. dissentiente).—*The sons succeed in preference to married daughters to *ayautuka stridhan* property received by a woman from her father after marriage.

The word '*Kanya*' in Dayabhaga Chapter IV, section II paragraph 16 is confined to unmarried daughters alone.

Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya (1) followed.

The Dayabhaga of Jimuta Vāhana is a paramount authority in the Bengal School. Other authorities may be followed; if there be any ambiguity in Jimuta Vāhana's text, Srikrishna and Raghu Nandana deserve the greatest respect, but their opinions must yield to the authority of Jimuta Vāhana.

*Per Brett J. (Cox J. dissentiente).—*The Dayabhaga lays down a general law of succession to *Ayautuka stridhan* and makes an exception in the case of such property received from a father, only to the extent that in the first instance unmarried daughter is preferred to the son.

*Per Mitra J.—*The later opinions of Srikrishna and Raghu Nandana which are not based on the text of the Dayabhaga ought not to be followed by the Courts of Bengal

Judoo Nath Sircar v. Bussant Coommar Roy (2) and *Gopal Chandra Pal v. Ram Chandra Pramanik* (3) referred to.

Appeals by the Plaintiffs.

Suits for declarations of title and for recovery of possession.

The facts of the case appear sufficiently from the judgment of Brett J.

The appeal came on for hearing before BRETT and COXE JJ. on 3rd and 4th June 1908.

Mr. B. Chakraverti (with him *Mr. K. N. Chowdhury* and *Babus Dwarka Nath Chakrabutty* and *Mohini Mohun Chakrabutty*) for the Appellants.—The only point in this suit is whether the

* Appeals from Appellate Decrees Nos. 2095, 2441 to 2443 of 1906 against the decrees of Babu Ananda Nath Majumdar, Subordinate Judge, First Court, of Mymensingh, dated the 16th August 1906, reversing those of Babu Syama Charan Ukil, Munsiff, Second Court, at Tangail, dated the 27th March 1906.

(1) (1905) 3 C. L. J. 15 (24); I. L. R. 33 Calc. 315 (325).

(2) (1873) 19 W. R. 264; 11 B. L. R. 286.

(3) (1901) 1 L. R. 28 Calc. 311.

married daughter or the son is the preferential heir with regard to the property received by a lady from her father after marriage. The learned Subordinate Judge is wrong in concluding that Dayabhaga is against us. The position of paragraph 16, section II, Chapter IV of Dayabhaga is to be looked at. It is an exception to the general rule of succession to *ayautuka* property coming from the father.

[COXE J.—Whether '*kanya*' stands for daughter].

'*Kanya*' stands for daughter when it is used conjunctively with *putra*; in all other places the word दुहिता is used for daughter. Referred to the word एव in the above paragraph of Dayabhaga. एव is emphatic and suggests that a brother succeeds with the maiden daughter in case of ordinary *ayautuka* property. Next referred to Prosonna Kumar Tagore's Dayabhaga with six commentaries, page 148. In every case of the six commentaries with the exception of Srikrishna, '*kanya*' is used in the sense of damsel and not in its generic sense. In dealing with the order of succession in case of *yautuka stridhan*, Jimuta Vahana goes on to discuss on certain conflicting texts and paragraph 16, section 2, Chapter IV, is one such. Referred to the summary given in Srikrishna's Commentary on Dayabhaga at page 260 at the end of Chapter IV, section 3, where a son is placed after a maiden daughter; other commentators have gone far astray in discussing about the word '*brahmani*,' but have not in any way changed the order given by Srikrishna. Referred to Jogendra Siromoni's Hindu Law, 2nd edition, pages 594 to 597. In the earlier edition the learned author expressed a doubt on this point but on mature consideration he came to the present conclusion, which supports his view. He also relied on *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (1).

The Dayabhaga does not show on the face of it that the view taken by the learned Subordinate Judge is right. If that view were accepted, paragraph 16 section II Chapter IV would be incongruous.

The authority on which the lower appellate Court relied, viz., *Dayakrama Sangraha of Srikrishna* does not support him. Referred to section 5 Chapter II of the same. In *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (1), Mookerjee J. pointed out that paragraph 4, section V, Chapter II of *Dayakrama Sangraha* would be meaningless, if paragraphs 2 and 3 refer to *ayautuka* property.

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Referred to Dayatatwa of Raghu Nandan, paragraphs 17 and 18 Chapter V. *স্বীকৃতিপত্রিকা*; does not refer to paragraph 16 at all. Any daughter means daughter of any particular class, as *Brahmin*, *Khsatriya* &c., and not married or widowed daughter.

Then referred to Macnaghten's Principles and Precedents of Hindu Law (1829) Vol. I page 39, Strange's Hindu Law (1835) Volume II page 247, and Appendix Chapter XI page 403, accepting Srikrishna's view as expressed in his commentary as the correct view; Shama Churn's Vyavastha Darpana (Edition of 1859) Volume II and Dr. Gooroodas Banerjee's Hindu Law of marriage and *stridhana*, page 407 and Mayne's Hindu Law (7th Edition) page 900.

The general rule as to succession to *ayautuka* property applies to all kinds of *ayautuka* property; only in the case of *পিতৃদত্ত অয়ৌতুক* property the single modification was made and that is that the maiden daughter and son do not take together, but the former excludes the latter.

[COXE J.—In *Gopal Chandra Pal v. Ram Chandra Pramanik* (1), whether the order as to *ayautuka* or *yautuka* was applied?].

The *ayautuka* was applied as also in the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (2),

Referred also to *Judoo Nath Sircar v. Bussunt Coomar Roy* (3), *Hurymohun Shaha v. Shonaton Shaha* (4), *Gopal Chandra Pal v. Ram Chandra Pramanik* (1), and *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (2). The decision in *Hurry Mohun Shaha* (4), shows that in point of fact there is no distinction with regard to the succession to *ayautuka stridhana*, whether it emanates from the father or from any other person except that in the former case the maiden daughter excludes the son. In *Basanta Kumari Debi v. Kamikshya Kumari Debi* (5), a passage is to be found with regard to *ayautuka stridhana*. It was conceded in that case that the ordinary rule of succession to *ayautuka stridhana* applied to the case of *পিতৃদত্ত ayautuka stridhana*.

Dr. Priya Nath Sen (with *Dr. Rash Behary Ghose* and *Babu Akhilbandhu Guha*) for the Respondents relied on

(1) (1901) I. L. R. 28 Calc. 311.

(2) (1905) 3 C. L. J. 15; I. L. R. 33 Calo. 315.

(3) (1873) 19 W. R. 264; 11 B. L. R. 286.

(4) (1876) I. L. R. 1 Calc. 275.

(5) (1905) 2 C. L. J. 238 (240); 10 C. W. N. 1 (5); I. L. R. 33 Calc 23 (27).

Dayabhaga, Dayakrama Sangraha, Dayatatwa of Raghu Nandan and Jagannath's Digest.

According to Dayabhaga the ordinary rule of succession of *ayautuka* stridhana is based upon the interpretation of '*Kanya*.' That word does not always mean *unmarried daughter* with regard to *द्विद्वय stridhana*. The special rule is laid down, first daughters, and then the son. In this respect Dayakrama Sangraha and Dayatatwa are explicit. The real point at issue is what '*Kanya*' means.

[BRETT, J.—Where do you get the order of succession amongst the daughters themselves? This is an exception to the general rule and it does not apply at all].

The general rule to which it is an exception does not apply ; but the general rule which governs the order of succession amongst daughters is not the general rule to which it is an exception.

The guiding principles in determining the order of succession in these cases are the instinct of natural affection and the principle of compensation ; Mitakshara gives certain physiological grounds. Doctrine of spiritual benefit is not the sole guiding principle. In para 16, chapter IV, section II, the Dayabhaga applies the principles of Mitakshara School in stating that a son and a daughter succeed together to *ayautuka* stridhana.

'*Kanya*' primarily means *unmarried daughter* but secondarily means both *married* and *unmarried daughters*. If *तन्* refers to *कन्या* it may mean both *married* and *unmarried daughter* and if it refers to *स्त्रियासु* it may still mean both *married* and *unmarried daughter*. If *कन्या* meant *unmarried daughter* only, how could one conceive of mentioning her *अपत्य*. Chapter II, section V of Dayakrama Sangraha contained no division of paragraphs in the original. Para 2 and first part of para 3 form part of the same sentence with para 1. In para 4, Srikrishna was dealing with Manu's texts ; so far as the line of succession is given, it accords with that given for *yautuka* property.

"As in the case of *yautuka* property" it is admitted that that part can not refer to *yautuka* property, in as much as similarity presupposes difference. Looking to para 4, section V of Dayakrama Sangraha it will be impossible to argue that para 2 does not refer to the same case as para 1 referred to. It can not be said that para 2 does not refer to property given by father at any time other than at nuptials : all those compose one sentence.

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बुनदि: can not in any way control the line of succession as given in the foregoing lines. If the passage containing "as in the case of *yautuka* property" refers to सिद्धन्त *yautuka* property, it will be purely illogical, for then it will be saying that *ayautuka* property devolves as *yautuka* property. The ground of Mookerjee J's judgment in *Ram Gopal Bhuttacharjee v. Narain Chandra Bandopadhyaya* (1), is that it is possible to attach two different meanings to two parts of the same passage in the Dayakrama Sangraha, which cannot be. Dayakrama Sangraha is subsequent to the synopsis. Line of succession to सिद्धन्त *ayautuka* property is different and section V points out the extent of that difference.

Referred then to Colebrooke's Digest, volume IV. pp. 297, 298, and Shama Churn's Vyavastha Darpan (3rd edition) pages 242 to 245; the reason given for changing opinion is more sensible and reasonable. Also referred to Mayne's Hindu Law (7th edition) page 900 and Golap Chandra Sastri's Hindu Law page 415.

As to the decided cases, excepting the case of *Ram Gopal Bhuttacharjee* (1), all the other cases are in his favour, inasmuch as they rely upon Dayakrama Sangraha. In none of those cases it was said that section V para 3 of Dayakrama Sangraha did not apply to सिद्धन्त *ayautuka* property but only a particular meaning was given to बुनदि: in that para. The observation in *Ram Gopal Bhuttacharjee's* case (1), is only an *obiter*, the question for decision therein having been, whether a mother or the husband was the preferential heir.

Mr. Chakraverti in reply.—In chapter IV of the Dayabhaga the word '*Kanya*' is everywhere used in the sense of unmarried damsel or daughter excepting in sections III paras 32 and 33 which have been held by a Bench of this Court to be interpolations; even there '*Kanya*' is used conjunctively with *putra*. He then goes on to show how *Dayatatwa* is in his favour. Para 16 is a digression in which the learned author deals with an exception to the general rule laid down in para 13 and continued in para 17 which has no reference to para 16.

If you accept the line of succession laid down in Dayakrama Sangraha you must accept it in full or you must accept that laid down in the Dayabhaga as understood by Srikrishna in his commentary. There is no half way in the matter. If you follow the Dayakrama Sangraha you must adopt the *yautuka* line of

succession through and through and this you can not do in the face of the cases of *Gopal Chunder Pal v. Ram Chandra Pramanik* (1), and *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (2). If Srikrishna would be regarded as an authority in anything, his commentary on the Dayabhaga should be regarded as true and binding commentary in this matter.

The treatment of the subject in *Ram Gopal Bhattacharjee* (2), is not an *obiter dictum*. For the last 50 years the question as to what should be the line of succession in the case of *ayautuka* *विश्वना* *Stridhana* was at issue and a succession of decisions shows that the lines of succession should not be that laid down in Dayakrama Sangraha but certain other, and the line indicated was undoubtedly that laid down in case of ordinary *ayautuka* *Stridhana*. In different cases, different means were adopted to arrive at a line of succession, so that in the case of *Ram Gopal* (2), the learned Judges who decided that case were bound to decide once for all what should be the real line of succession before they could decide the question at issue, so that that decision cannot be said to be an *obiter*.

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The judgments of the Court were as follows :

Brett J.—The appellants in these four appeals are the four sons and the respondents are the three married daughters of Saroda Moye Bosu. On the 15th June 1853, Saroda Moye received a gift from her father of Taluq No. 5480 Roy Chandra Sarma. This was after her marriage. On the 7th October 1903, she died leaving 4 sons and 3 daughters her surviving. Three of the sons other than the appellant in appeal No. 2095 of 1906 applied to the Collector to be registered as heirs of the *taluk* by right of inheritance from their mother. They were opposed by the 3 daughters and on the 24th August 1904, the applications of the sons were refused and order was passed to register the 3 daughters as proprietors of the taluq by right of inheritance from Saroda Moye Bosu. The four brothers then filed 4 suits, on the 5th July 1905 and following days, praying for declaration of their title, each to $\frac{1}{4}$ share in the taluq and for recovery of possession.

In the Court of first instance, the suits were heard *ex parte* in the absence of the defendants and were decreed, the Munsiff holding that the taluq was *ayautuka stridhan* of the mother and that the plaintiffs as sons were preferential heirs to the married daughters.

(1) (1901) I. L. R. 28 Calc. 311. (2) (1907) 3 C. L. J. 15, I. L. R. 33 Calc. 315.

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On appeal the lower appellate Court has set aside the judgment and decree of the Munsiff in all the cases and has dismissed all the suits.

The plaintiffs, the four sons, have appealed to this Court in four appeals. These have been heard together and will all be governed by this judgment.

Admittedly the taluq which is the subject of the present litigation is the *pitridatta ayautaka stridhan* of Sarada Moye Bosu and the question which we have to decide is whether the sons or the married daughters are the preferential heirs.

The learned Subordinate Judge has gone with great care and detail through the various authorities and has come to the conclusion that the balance of authority is strongly in favour of the married daughters. In this appeal it has been argued by the learned Counsel for the appellants that the learned Subordinate Judge has erred in law in the view which he has taken of those authorities and that in fact they support the contrary view that the sons are the preferential heirs.

The determination of the matter in dispute depends on the construction which should be placed on the passage in paragraph 16 section II chapter IV of the edition of the Dayabhaga of Jimuta Vahana (as translated by Colebrooke). In that passage Jimuta Vahana has adopted the law as laid down by Manu in sloka 198 chapter IX. The passage, which is given in the vernacular in the judgment of the Subordinate Judge, runs as follows : " As for a passage of Manu. ' The wealth of a woman ' which has been in any manner given to her by her father, let the *Brahmani* damsel take ; or let it belong to her offspring ' ; since the text specifies ' given by her father ' the meaning must be, that property, which was given to her by her father, even at any other time besides that of the nuptials shall belong exclusively to her daughter : and the term *Brahmani* is merely illustrative [indicating that a daughter of the same tribe inherits.] " The words used which are translated as the *Brahmani* damsel are "*Brahmani Kanya*," and the whole contest has centered round the point whether "*Kanya*" should be translated to mean generically any daughter, and so to include married or widowed daughters, or should be confined to the unmarried daughters alone. If the first meaning be accepted the defendants must succeed in these suits ; if the second be preferred the plaintiffs must succeed.

Now it is suggested by the learned Counsel for the appellants that the first and obvious way to ascertain the meaning of the

word "*Kanya*" in the passage is to search through chapter IV of the *Dayabhaga* and see where the word "*Kanya*" occurs and what is the meaning which has been given to it. In section I the word is used twice as meaning a bride at the time of marriage, which may be taken to imply a maiden daughter. In section II, irrespective of the passage in dispute, the term *Kanya* wherever it occurs means maiden or unmarried daughter. In section III *Kanya* is used in the same sense except in verses 32 and 33. These are the passages on which the Subordinate Judge relies to expose, as he says, the fallacy of the hypothesis that the word *Kanya* is used by Jimuta Vahana in the restricted sense of unmarried daughter. It is unfortunate that the two passages on which the Subordinate Judge relies are held by some commentators to be of doubtful authenticity, and by others have been pronounced to be interpolations, and that in a case on the Original Side of this Court, lately heard by a Special Division Bench of which one of us was a member, it was held that the two passages were forgeries. The final decision on that point will no doubt rest with their Lordships of the Privy Council, but meanwhile it is apparent that the result of the search through chapter IV of the *Dayabhaga* goes strongly to support the argument that the word *Kanya* is used in that work to mean an unmarried daughter. Any argument, based on the use of the word "*Kanya*" in modern conversation and literature seems to us to be dangerous. In the course of 300 years words in all languages change and modify their original meaning.

The other method of ascertaining the meaning of the word *Kanya* as used in the passage is to look first to the context and then to enquire and ascertain how the passage has been interpreted by other authors and commentators. The decision of this case depends as I have already noticed on the meaning to be given to the word *Kanya* in that passage.

Now in dealing with the question by the light of opinions expressed by authors and commentators, we are met with a difficulty which the Subordinate Judge has either not recognized or ignored that these high authorities in the works which they have produced and in the different editions of their works have contradicted themselves and have displayed a wavering of opinion which can not but have the effect of weakening confidence in them. In fact the point appears to be one of considerable doubt and difficulty and in dealing with it we have endeavoured to give to the various authorities most careful and impartial study and consideration.

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Dealing with the question first on principle, we have it that the property in suit having been given to Sarada Moye Bosu after her marriage comes under the head of *ayautuka Stridhan*. In the ordinary line of inheritance to *ayautuka Stridhan* the sons succeed as preferential heirs to the married or widowed daughters. In the case before us the property can only go to the married daughters if the Hindu law makes an exception between *ayautuka Stridhan* which is "Pitridatta" or given by the father and ordinary *ayautuka Stridhan*. The case for the defendants is that the texts on which they rely lay down a special line of succession to *pitridatta ayautuka Stridhan*; apparently it is not suggested that the exception is governed by either the principle of spiritual benefit or natural affection. The learned Subordinate Judge has however suggested that it is governed by a "natural desire to make a sort of equitable distribution of the effects of the parents, amongst children male and female", and "to a very laudable desire on the part of the sages to provide for helpless and indigent relations." It does not however appear to follow of necessity that married daughters should be more indigent and helpless than sons.

Dealing next with the authorities, we have first to take chapter IV, section II of the Dayabhaga in which the passage occurs. The chapter first lays down the general rule of succession with regard to the separate property of a woman and provides that it devolves in the first instance in equal shares on her sons and unmarried daughters, and in support of this view quotes passages from Sancha, Lichita and Devala. It then goes on to lay down the order of succession of other heirs, and in para 11 where noting that the son's son is preferred to the daughter's son, it explains that the reason of it is that the married daughter is debarred from the inheritance by the son. In paragraphs 13 to 15 the nature of *yautuka stridhan* or property received by a woman at her nuptials, is explained, and it is pointed out that the authorities, *e. g.*, Narada, Catyayana and Yajnyawalkya, which give the preference to all unmarried daughters over sons are referring to property of that class only. Then follows the paragraph 16 in which the passage occurs on which the decision of this case mainly depends. It deals with property given to a woman by her father "in any manner" "even at any time besides that of the nuptials," and provides that it shall be taken by the *Brahmani* damsel, or let it belong to her offspring.

"Her offspring" is generally accepted as meaning the off-

spring of the deceased. The next two passages in the paragraph offer a possible explanation of the use of the word *Brahmani*. The concluding passage runs "such is the meaning of the passage ; for [else according to the preceding interpretation] all the texts [which declare the equal right of the son and daughter, to inherit their mother's property in certain cases,] would be incongruous." The texts here referred to are those dealt with in the preceding paragraphs of the section and which lay down the general rule that the sons and unmarried daughters equally divide the property of the mother, and the passage seems to lay down that the paragraph provides in respect of *Ayautuka stridhan* received from a father an exception to that rule, and nothing more.

The succeeding paragraphs 17 to 24 seem clearly to go back to paragraph 13 and to deal with the texts referred to in that paragraph. They explain that the term "her issue" in the text of Narada refers to the issue of the mother and not of the daughters. Section 13, however, distinctly provides that the texts relate only to the *yautuka* wealth given at the nuptials because these passages contradict the text of Devala cited in paragraph 6. That text runs "A woman's property is common to her sons and unmarried daughters, when she is dead ; but, if she leave no issue, her husband shall take it, her mother, her brother or her father."

Paragraphs 22 and 23 go on to lay down the line of succession to the property of a woman received at her nuptials, and the passages following explain how the order of succession is modified by the form adopted at the time of marriage.

For the appellants it is argued that paragraph 22 resumes the discussion of the succession to *yautuka stridhan* from paragraph 13 and that the intervening paragraph 16 alone deals with the succession to *pitridatta ayautuka stridhan* and provides in the case of such property the exception to the general rule of succession that the unmarried daughters succeed in preference to the sons and not jointly with them. This view is supported by the order of succession to *pitridatta ayautuka stridhan* which is given in the synopsis of Srikrishna at the end of Chapter IV.

For the respondents it is argued that the word *kanya* in paragraph 16 is used generically to include all daughters ; that therefore all daughters whether unmarried, married or widowed, are preferred to sons, and that this is the view which Srikrishna himself adopted in his Dayakrama Sangraha. Further it is argued that the discussion in the subsequent paragraphs of the words

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"her issue" would be unnecessary if the expression "Brahmani kanya" did not cover married as well as unmarried daughters of the deceased. This contention does not, however, seem to be sustainable, for the discussion in paragraphs 17 to 21 seems clearly to refer to the meaning of the words "her issue" as used in the text of Narada in paragraph 13.

It is not easy to determine the exact meaning of the text of the Dayabhaga, but the synopsis in which Srikrishna gives the order of succession shows clearly enough that he then interpreted it to mean that the unmarried daughters alone were preferred to sons in the succession to property given to a woman by her father not at her nuptials.

The next authority we come to is the Dayakrama Sargraha of Srikrishna. This is described in the preface as containing a good compendium of the law of inheritance according to Jimuta-Vahana's text as expounded in his commentary on the Dayabhaga. Chapter II deals with the order of succession to the peculiar property of a woman; section I deals with the succession to the property of a maiden; section II defines the peculiar property of a married woman; section III deals with the succession to the separate property of a woman when received at her nuptials, and section IV with the separate property not received at her nuptials. Then comes section V which is important for the purposes of this case, and which deals with the succession to the separate property of a woman when given to her by her father. Paragraphs 1, 2 and 3 deal with the order of succession. It has been pointed out to us that in the original the text is not divided into paragraphs, and that the paragraphs 1 and 2 and the first half of paragraph 3 down to "received at nuptials" form one paragraph. These passages as well as the remaining part of paragraph 3 and paragraph 4 have been interpreted by the Subordinate Judge to mean that the order of succession to *ayautuka stridhan* is the same as that of *yautuka stridhan* given by the father, and is first the maiden daughter, then the married daughters who have or are likely to have male issue, then the barren and widowed daughters, and on these failing the sons and the rest. This construction is supported by the learned pleader for the respondent who argues that the latter portion of paragraph 3 and paragraph 4 merely confirms the preceding paragraphs.

The meaning and effect of the four paragraphs have been considered by a Bench of this Court in the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (1). In that

judgment, the learned Judges express the opinion that the first paragraph of section V should be taken to apply to the separate property of a woman given to her by her father both at her nuptials and at any time other than her nuptials, that is to say, to both *yautuka* and *ayautuka stridhan*, that sections 2 and 3 should be taken to lay down the rule of succession in the case of *yautuka stridhan*, and paragraph 4 the right of succession applicable to *ayautuka stridhan*. They take the words "as in the case of property received at nuptials" in the 3rd paragraph to mean that it refers to such property only. The learned Judges also point out that if this view be accepted, there will be no difference between the line of succession as laid down by Srikrishna in his synopsis to Chapter IV of the Dayabhaga and in the section of his Dayakrama Sangraha with which we have been dealing. The learned pleader for the respondents contends that it is impossible to reconcile the views expressed in the two works and that the line of succession given in the Dayakrama Sangraha should be accepted as correct.

One thing is however clear that if the two opinions be held to be irreconcilable, the authority of the learned commentator is considerably weakened.

The next authority is the Dayatattwa by Raghunandan. Chapter X deals with the succession to woman's property. The first paragraph lays down the general rule that a woman's property is common to her sons and maiden daughters when she is dead, and the succeeding paragraphs up to paragraph 10 deal with the succession on failure of sons and married daughters. Paragraph 12 deals with property received by a woman at the time of her marriage and prefers the married daughters to the sons. Paragraph 16 deals with *ayautuka stridhan* received from the father and quotes the passage from Manu relied on in the Dayabhaga Chapter IV section II, para 16. Paragraph 17 provides that on default of these the son succeeds, quoting in support the authority of Manu. The question then arises whether this applies to *ayautuka stridhan* or whether it follows in natural order of sequence paragraph 13 which deals with *yautuka stridhan*. The Subordinate Judge has accepted the former alternative, but here as in the other authorities the succession to *ayautuka stridhan* is introduced seemingly in parenthesis, and it seems open to doubt whether paragraph 17 really refers to it or to *yautuka*. Paragraph 18 points out that similarly also the other text declaring the succession of daughters previous to that of sons, refers to

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this description of woman's property. This description may refer to "property given by the parents" as mentioned in paragraph 11 or to nuptial presents as mentioned in paragraph 13.

Mr. Macnaghten in his Principles and Precedents of Hindu Law published in 1829 in Volume I, pages 39 and 40 follows, in the case of *ayautuka stridhan* received from the father, the line of succession given by Srikrishna in his synopsis at the end of Chapter IV of the Dayabhaga.

Sir Thomas Strange in his Elements of Hindu Law Volume I, page 247 notices the intricacy with which the succession to woman's property is regulated, and in the appendix Volume II page 403 extracts the order of succession as given in the synopsis of Srikrishna to Chapter IV of the Dayabhaga and states that it is the settled order of succession to the separate property of a woman.

Neither of these learned authors could claim to be, as those previously mentioned, expounders of the text of the Hindu Law, but both had large experience in the Courts of law and presumably were well aware of the authorities that were accepted in them.

The next authority is the Vyavastha Darpana of Shama Churn Sircar. In his first edition published in 1859, he adopts the exposition of the law of succession to the property of a woman received from her father at any time other than her nuptials given by Srikrishna in his synopsis attached to chapter IV of the Dayabhaga in preference to that given in the Dayakrama Sangraha, because being consonant with the Dayabhaga it is respected above the Dayakrama Sangraha. He also accepts the view that in the passage in chapter IV, section II, paragraph 16 of the Dayabhaga *kanya* means "maiden daughter."

In the second edition of the Vyavastha Darpana published apparently in 1867 (see pages 718—719), the learned author accepts the order of succession to the property of a woman given to her by her father at any time other than at her nuptials, given in Srikrishna's Commentary on the Dayabhaga. In a remark which follows the portion of the text dealing with this subject, the author notices that in the Dayakrama Sangraha, Srikrishna lays down that succession to the property given by a father to his daughter, whether at the time of her marriage or at any other time, is regulated according to the principles applicable to the property received at nuptials, and he expresses the opinion that this view is supported by the note of Jimuta Vahana in the

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sons. The learned Subordinate Judge in dealing with this authority fails to notice that the opinion above expressed is clearly in favour of the view that the sons succeed to *pitridatta ayautuka stridhana* after the unmarried daughters. In commenting on the judgment of Mr. Justice Mitter in the case of *Judoo Nath Sircar v. Bussunt Coomar Roy* (1), the learned author remarks that the conflict between Srikrishna in the Dayakrama Sangraha and his master in the Dayabhaga cannot be reconciled except by showing that the text of the Dayabhaga is capable of being interpreted in the manner Srikrishna has done.

Babu Golap Chandra Sarkar Sastri in his work on Hindu Law notices the conflict between the Dayakrama Sangraha and Srikrishna's synopsis to Chap. IV of the Dayabhaga in respect of the line of succession to *Ayautuka Stridhana* which is given by a father at any time other than the nuptials, and notices that the question is beset with considerable difficulty arising from apparent contradictions. Mayne in his work on Hindu Law and Usage (7th Edition) p. 900 Sec. 673 accepts the view that all the daughters are preferential heirs to the sons.

Taking next the decisions of the Courts we find that in the case of *Gopal Chandra Pal v. Ram Chandra Pramanik* (2), this Court refused to follow the Dayakrama Sangraha in respect to the order in which a brother or a husband was entitled to succeed to movable property received by a woman from her father after her marriage, and relied in preference on the text of the Dayabhaga as being the paramount authority in the Bengal School.

In the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (3) to which reference has already been made, a similar view was accepted in respect of the mother's right to succeed to an Anvadheya Stridhan of a childless woman in preference to her husband. The learned Judges in dealing with the para 16 Sec. II Chap. IV of the Dayabhaga expressed the opinion that subject to the one variation made in that passage "*yautuka* given by the father is inherited as other *yautuka* and *ayautuka* given by the father is inherited as other *ayautuka*": and they attempt to reconcile the paragraphs 1 to 4 of Section V of the Dayakrama Sangraha with this view in the manner already noticed in this judgment.

In the case of *Judoo Nath Sircar v. Bussunt Coomar Roy* (1), the exact words of the Dayakrama Sangraha have not been accepted

(1) (1873) 19 W. R. 264; 11 B. L. R. 266.

(2) (1901) 1, L. R. 28 Calc. 311.

(3) (1905) 3 C. L. J. 15; 1, L. R. 33 Calc. 315.

and in preference an attempt has been made to reconcile them with the text of the Dayabhaga.

The result of a careful examination of the commentators and authorities on Hindu Law and of the cases which have come before the Courts in which the question of the succession to the *vitridatta Ayautuka Stridhana* of a woman has been considered, does not at all go to support the opinion expressed in rather over-confident terms* by the Subordinate Judge in the lower Appellate Court; the balance of authority is heavily in favour of the married daughters being preferred to the sons.

If we rely on the Dayabhaga itself, and the earliest interpretation put on it by Srikrishna in his synopsis, we must hold that the sons should be preferred in the line of succession to the married daughters. If we take the words of the text of the Dayabhaga we find that it is only in two exceptional passages, and those of doubtful authenticity, that the word "Kanya" is used by itself in the Dayabhaga to mean a daughter in the generic sense. When the author intends to convey that meaning the word "Duhita" is used. "*Kanya*" is used to mean "a bride at the time of bridal" and "an unmarried damsel," and in fact the original meaning of the word appears to have been "a girl up to 10 years of age." According to the ordinary rule, unmarried daughters and sons succeed jointly to the separate property of their mother, and the question is whether in the passage of the Dayabhaga under consideration it was intended to give the unmarried daughters preference to the sons, or to give all the daughters preference to them. Certainly the use of the word "Kanya" seems to go far to support the former conclusion.

To support the contention that the word *kanya* is used in the generic sense to include all daughters, the learned pleader for the respondent has relied on the passage in the Dayakrama Sangraha to which we have referred, and has argued that the learned Judges in the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (1) have failed to reconcile the discrepancy between these passages and the synopsis in the Dayabhaga which it is contended is irreconcilable.

The text of the ancient authors do not however yield readily to those methods of construction which we are able to adopt in dealing with books of recent date. The style is often involved. No rules of punctuation are observed, and matters are introduced in parenthesis both in passages and in sections of the works

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without any apparent system or rule. One of the learned Judges who was a party to the decision under consideration is a Sanskrit scholar who was able to seek elucidation of difficulties by reference to the original texts. Under these circumstances, it seems to me that we should hesitate before differing from the view expressed in that judgment. The Dayakrama Sangraha is supposed to have been written by Srikrishna after his synopsis to the Dayabhaga, but as to this there is no certainty. At all events, there is nothing in the Dayakrama to explain why the learned author had modified his previous opinion, and therefore there is every reason to attempt to reconcile the two expressions of opinion if it be possible. If that can be done in the manner adopted by the learned Judges in the case under notice, all further difficulties will disappear.

If such reconciliation be impossible, then it seems that the credit to be attached to Srikrishna as an authority is much weakened.

The meaning of the text of the Dayatattwa of Raghu Nandan is far from being clear owing to the introduction in parenthesis of the reference to *ayautuka stridhan* given by the father.

Macnaghten and Strange both accept Srikrishna's synopsis at the end of Chapter IV of the Dayabhaga as laying down the correct law.

Shama Churn Sircar in his *Vyavastha Darpana* wavers in opinion, and it is remarkable that in the first and second editions which were published during his lifetime and in which he follows Srikrishna's synopsis and accepts the meaning of *kanya* to be unmarried daughter, he gives reasons for his conclusions, while in the third edition which was published after his death, no reasons whatever for his change of opinion, (if in fact the opinion expressed in that edition be his) are mentioned.

Jogendra Smarta Siromoni refuses to accept the view that all daughters should be preferred to sons. The other learned authors invite attention to the difficulty which has arisen in interpreting the passage in the Dayabhaga owing to subsequent contradiction, but do not assist us to elucidate it.

The decisions of the Courts to which we have referred indicate that where there is a difference between the Dayakrama Sangraha and the Dayabhaga, the former has been rejected and the Dayabhaga followed.

Taking the passage of the Dayabhaga as it stands, and giving

due effect to the use of the word *kanya*, and taking also into consideration the context and the fact that the earliest interpretation of the text was in favour of giving the sons preference to the married daughters in the succession to the *pitridatta ayautuka stridhan*, the reasonable conclusion appears to be that the intention of the Dayabhaga was to lay down a general law of succession to *ayautuka stridhan* and to make an exception in the case of such property, received from a father only to the extent that in the first instance the unmarried daughter is preferred to the son. I see no reason to differ from the view taken by the learned Judges in the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhy* (1) that the synopsis of Srikrishna to Chapter, IV of the Dayabhaga and the paragraphs in the Dayakrama Sangraha are capable of reconciliation

I would, therefore, set aside the judgment and decree of the lower appellate Court and decree the appeal and restore the judgment and decree of the Court of first instance with costs.

As, however, my learned brother differs in opinion from me, the case must be referred to the Hon'ble the Chief Justice for orders under section 575 of the Code of Civil Procedure.

Coxe J.—In this case the sole point in issue is, whether sons succeed in preference to married daughters to property given to a woman by her father at a time other than the time of nuptials; and the decision of this question turns exclusively, or almost so, on the further question whether the word "*kanya*" in paragraph 16, section II, chapter 4 of the Dayabhaga refers exclusively to unmarried daughters or includes all daughters.

It will be convenient to deal with the authorities in order, and the first that must necessarily be considered is the Dayabhaga itself. The Dayabhaga deals first with the succession to woman's property generally, and lays down that the property of a woman goes on her death, first, to her son and unmarried daughter, and then to the married daughters. The author then deals with the *yautuka* property, which he apparently regards as exceptional, and lays down that it goes on the mother's death to the daughters. Then comes the text on which this controversy hinges. (IV, ii, 16). The author quotes a text of Manu which runs, "The wealth of a woman, which has been in any manner given to her by her father, let the *Brahmani* damsel" (*kanya*) "take; or let it belong to her offspring." And as I have said, the controversy arising in this case turns principally on the

(1) (1906) 3 C. L. J. 15; I. L. R. 33 Cal. 315.

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question, whether the word "*kanya*" is intended to refer only to the unmarried or to all daughters.

There is no dispute that the term means "daughter." It is not suggested that any girl who was not a daughter could by any possibility succeed. But it is strenuously argued that the word ordinarily means a maiden daughter only, and is only used to signify daughters in general, when used in conjunction with the word *putra* (son). Particular reference is made to the use of the word in the text of Devala, quoted in paragraph 6 of the same section of the Dayabhaga, which runs: "A woman's property is common to her sons and '*kanya*,' when she is dead; but if she leave no issue, her husband shall take it etc." It is very curious that if the word "*kanya*" here refers only to unmarried daughters, there is no direct reference to unmarried daughters at all, though admittedly they succeed before the husband. But it is not disputed that the word "*kanya*" in this passage means unmarried daughters only.

At the same time, it cannot be denied that the word is occasionally used to signify daughters generally, and the sense in which it is used in this passage must in my opinion be gathered from the context. It has been argued that the paragraphs succeeding paragraph 16 deal with the question whether in the text of Manu quoted above, the words, "her offspring" refer to the daughter's offspring or the offspring of the deceased mother. And it has been argued that the fact that this point has been thought worthy of serious discussion shows conclusively that the word "daughter" must include married daughters, for obviously an unmarried daughter could not, in the eye of the law, have any offspring at all; and, therefore, if only unmarried daughters were referred to, there could be no controversy or discussion as to what was meant by the words "her offspring." To this argument there would, in my opinion, be no answer, if the paragraphs really referred to the text of Manu before quoted. But if I understand the paragraphs aright, they refer to a text of Narada quoted in paragraph 13, and not to the text of Manu at all. Still the fact remains that the author of the Dayabhaga deals with the succession to *yautuka* property in paragraphs 13, 14 and 15. He then deals with this special subject of the succession to *pitridatta* property. He then devotes paragraphs 17 to 21 to a possible misconception that might arise with regard to the succession to *yautuka* property laid down in paragraph 13. And then he goes on dealing with the succession to *yautuka* pro-

perty generally. Taking the whole arrangement of the section, with the parenthetical reference to the succession to *pitridatta* property in paragraph 16 embedded in the general discussion of the succession to *yautuka* property, it seems to me that the author of the Dayabhaga regarded *pitridatta* property as coming under the rules relating to *yautuka* property, so far as daughters were concerned.

A *yautuka* property goes first to the son and unmarried daughter, then to the other daughters. *Ayautuka* goes first to the daughters and then to the sons. If really there were a third and entirely distinct order of succession to *pitridatta* property, it seems reasonable to suppose that in a work that is certainly not inattentive to detail, it would have been stated distinctly what it was.

It has been argued on behalf of the appellants that if he intended that daughters as a class succeeded to *pitridatta* property, the author of the Dayabhaga would certainly have laid down their order of succession within the class. To me the fact that he has omitted to do so, and has merely stated the fact of the daughter's succession in a parenthesis embedded in the middle of the rules governing the devolution of *yautuka* property, in which the order of succession of daughters *inter se* is set out, seems to indicate that he did not regard the succession of the "*kanya*" to *pitridatta* property as any exception to the rule governing the succession to *yautuka* property. It must be remembered that the word "*kanya*" was not his own. He was quoting from the Code of Manu, which was in verse, and presumably subject to the laws of metre and style. He did not feel himself bound to assign any specific meaning at all to the word "*Brahmani*," and it may well be that he did not feel himself bound to attach a restricted meaning to the word '*kanya*.' With reference to the words "or let it belong to her offspring" in the text under consideration, it may be asked why a word signifying both male and female offspring should be used if the text means that on failure of daughters the property goes to the sons. It is clear however from the context that the word "offspring" cannot refer to all the children but only to the children other than the "*kanya*." If therefore "*kanya*" means all the daughters, the word "offspring" must refer to the sons. If, on the contrary, the word "*kanya*" means unmarried daughter only, the text prescribes that in the absence of an unmarried daughter, sons and unmarried daughters inherit together, which is not suggested by any body. This consideration seems to me to support in some measure the

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view that the word "*kanya*" refers to all the daughters. I do not however lay any stress on this beyond saying that in my opinion the use of the word "offspring" is not inconsistent with the view that the term "*kanya*" refers to all the daughters.

Next comes the strongest authority on the side of the appellants, namely the summary by Srikrishna, at the end of Chapter IV of the Dayabhaga, of the rules of succession prescribed in that chapter. This clearly lays down that in the case of *pitridatta* property, not given at the time of marriage, the maiden daughter succeeds first, then the son, and then the other daughters.

It is argued, however, by the respondents that this authority has been destroyed by the fact that Srikrishna in his later work, "The Dayakrama Sangraha" (Chapter II, section 5) has laid down that the daughters succeed before the sons. It will be necessary to set out the first three paragraphs of the section in full. They run as follows :

"1. In regard to the wealth given by a father to a woman, at the time of the wedding, or antecedent or subsequent to it, a maiden daughter inherits in the first place.

"2. After her, a married daughter who has, and one who is likely to have, male issue inherit together.

"3. Next the succession devolves on the barren and widowed daughters, and in default of all daughters, the son and the rest succeed as in the case of property received at nuptials ; for a text of Manu declares. "The wealth of a woman which has in any manner been given to her by her father, let the *Brahmani damsel* take ; or let it belong to her offspring."

It was held in *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (1) that though the first paragraph referred to both *yautuka* and *ayautuka pitridatta* property, the second and third could refer to *yautuka pitridatta* property only. This view was based principally on the words "as in the case of property received at nuptials," and on the fact that, if the second and third paragraphs referred to an *ayautuka* as well as *yautuka pitridatta* property, it would be impossible to reconcile the Dayakrama Sangraha with the same author's synopsis of the Dayabhaga. It has been argued, however, before us that a consideration of the original text renders this view untenable. We are informed that the first two paragraphs and the third paragraph as far as the words "widowed daughters" form one sentence, prescribing

(1) (1905) 3 C. L. J. 15, 1, L. R. 33 Calo. 815.

that the maiden daughter is first entitled to succeed, then the married daughter and then the widowed daughter ; and ending with the word "entitled" which applies equally to all the preceding nominatives. An entirely new sentence then begins with the words, "In default of all the daughters." If this is so, and the fact has not been disputed before us, then although I have the greatest diffidence in dissenting from the view of the learned Judges in the case cited above, I find myself unable to understand how any distinction can be drawn between the first and the two following paragraphs in their relation to all kinds of *pitridatta* property. And it appears to me that the succeeding sentence "In default of all daughters the son and the rest succeed as in the case of property received at nuptials ; for a text of Manu declares, "The wealth of a woman, which has in any manner been given her by her father let the *Brahmani* damsel take" implies that in the view of Srikrishna at the time he wrote the Dayakrama Sangraha, the term "Brahmani damsel" was in effect synonymous with "all daughters." In paragraph 4, it is laid down that whatever is given by the father "belongs first to the damsel and after her it goes to her offspring, her son." This paragraph is to my mind conclusive that Srikrishna at the time he wrote the Dayakrama Sangraha regarded the term "*kanya*" as including married daughters, since otherwise he could not have referred to their sons.

Next comes the Dayatatwa of Raghunandan. Chapter X of this work begins by dealing with succession to Stridhan generally. Then in paragraphs 12 to 15 the author deals with succession to *yautuka*. Paragraph 16 deals with the text of Manu that *pitridatta* property goes to the *Brahmani* damsel. Paragraphs 17 and 18 run as follows :

"17. On default of these the son succeeds ; since Manu says 'on default of daughters the inheritance goes to sons.'

"18. Similarly also other texts declaring the succession of daughters previous to that of sons refer to this description of woman's property."

Then paragraph 19 begins. "On failure of sons and the others, a woman's nuptial presents go to the husband."

It is argued on behalf of the appellant that paragraph 16 is a parenthesis and that, at the end of it, the author resumes the consideration of the succession to *yautuka* property. In this view, the words "on default of these" at the beginning of paragraph 17 mean "on default of the daughters mentioned in para-

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graph 13." On the other hand, it is argued on behalf of the respondents that the words mean "On default of the *Brahmani* damsel mentioned in the preceding paragraph." It seems to me that both views are tenable and that it would be unsafe to build any firm conclusion on this passage. I may say however that the repetition of the words "nuptial presents" in paragraph 19 tends in small measure to show that the parenthesis about the *pitridatta* ends, and the discussion of *yautuka* property is resumed at that point.

The authority next quoted is Jagannath's or Colebrooke's Digest. It is difficult to base any conclusion on this work as it quotes both the text of Devala, to the effect that the son and maiden daughter together, and that of Catyayana, to the effect that the daughters, succeed, and draws no clear distinction between *yautuka* and *ayautuka* property. But in quoting the text of Manu (paragraph CCCXCIV) the author construes it as laying down that the property of a childless wife shall go to the daughter of a Brahman co-wife, or to the issue of that daughter. So that it is clear that the author did not regard the term "*kanya*" as necessarily confined to an unmarried girl.

Subsequent commentators may be briefly referred to, although the case must be decided on the view that is taken of the earlier authorities. Macnaghten is wholly in favour of the appellant. Strange is claimed as being in his favour, but all that appears in that work is a reprint of Srikrishna's synopsis at the end of chapter IV of Dayabhaga. Jogendra Nath Bhattacharyya is in favour of the appellant's contentions, but his views are in my opinion weakened by the distinction which he draws between the first and subsequent paragraphs of section V of the Dayakrama Sangraha. Golap Chandra Sarkar seems to have been unable to make up his mind on the point, and a still more remarkable instance of this indecision may be found in the work of Shama Churan Sircar. In the first edition of the work of that learned author, he seems to have been wholly in favour of the view urged by the appellant. In the second (Sec. 464), he admitted that the Dayabhaga furnished full authority for the contrary view, but thought that reasons required the postponement of the married daughters to the sons. But in the last edition of his work, published some months after his death, he went wholly round to the view for which the respondents now contend. On the other hand, Mayne is wholly opposed to the view taken by the appellants.

I attach a good deal of importance to the comments in the second edition of Shama Churn Sircar's *Vyavastha Darpana* and those in Mr Justice Banerjee's work on *stridhan*. The first author gives the succession as laid down in Srikrishna's synopsis at the end of chapter IV of the *Dayabhaga*. That was the order of succession which he thought was right. He defends it as based on reason. But he admits, and, as it seems to me, reluctantly admits that Srikrishna in the *Dayakrama Sangraha* lays down that succession to all *pitridatta* property is regulated according to the principles applicable to the *yautuka* property. And then he goes on to say "The above is not the solitary opinion of Srikrishna alone but also of Jimuta Vahana as is evident from the following note." The note is a quotation of the paragraph 16 which has already been set out in full. Now if the word "*kanya*" must necessarily mean an unmarried daughter, I cannot understand how Shama Churn Sircar can have felt himself forced to admit that paragraph 16 was opposed to the view which he was defending. For if the word "*kanya*," as we are now told, would necessarily convey to all Sanskrit scholars the signification "unmarried daughter," it is clear that the commentator must have seen at once that the *Dayabhaga* was not opposed to the synopsis and did not support the view that the order of succession to all *pitridatta* property was the same as that of succession to *yautuka*. And the fact that this evidently did not answer to him indicates strongly to my mind that the restriction of the meaning of the word "*kanya*" to unmarried daughters is untenable.

The same considerations apply though in a less degree to Mr. Justice Banerjee's observations in page 408 of his work on marriage and *stridhana* (second edition). Though he does not express any very decided opinion, he seems to accept the order laid down in Srikrishna's synopsis; but he observes that according to the *Dayakrama Sangraha* the order of succession was the same as for *yautuka* and that this "seems to be in accordance with the opinion of Jimuta Vahana and Raghu Nandan." And clearly if the word "*kanya*" had conveyed to the learned commentator's mind the meaning of "unmarried daughter" only, he could have had no reason whatever for saying that it was the opinion of Jimuta Vahana, that the order of succession for all *pitridatta* property was the same as that for *yautuka*.

We have been referred to two cases *Judoo Nath Sircar v. Bussunt Coomar Roy* (1) and *Gopal Chandra Pal v. Ram Chandra* (1) (1873) 19 W. R. 264.

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Pramanik (1). But all that was held in the first of these cases was that the words "sons and the rest" in the Dayakrama Sangraha did not include collateral heirs, and this finding does not seem to me to have any bearing on the present case. The second case also has no real application to this case.

I think that the appellants have failed to show that the Subordinate Judge is wrong. The only clear authorities on the point are the two diametrically opposed statements of Srikrishna. If either of these is to be preferred, it should, I think, be the latest, namely, the Dayakrama Sangraha. Otherwise the decision of the case must turn on the question whether the word "*kanya*" in the Dayabhaga includes married daughters. The Subordinate Judge is of opinion that it does include them. The arrangement of that portion of the Dayabhaga indicates that the author intended to include them. The interpretation of Manu's text given in Jagannath's Digest, and in the Dayakrama Sangraha indicate that the term was understood as including married daughters. Among the later commentators, Gooroo Das Banerjee and Shama Churn Sircar, in the second editions of their works, while accepting the order of succession laid down in the synopsis, were at the same time of opinion that that order was opposed to the Dayabhaga, a view which necessarily implies that they thought that the term "*kanya*" included married daughters. Against these authorities, there are the clear opinions of Macnaghten and Jogendra Nath Bhattacharyya which in their turn are opposed to that of Mayne. I find it impossible to hold on these authorities that the term "*kanya*" could not have been intended to include married daughters. I think that it does include them, and if this view is correct, these appeals must necessarily fail.

Accordingly I would dismiss these appeals, but I agree that they should be referred to another Judge or Judges under section 575 of the Civil Procedure Code.

Consequent on this difference of opinion, the matter was referred to the Chief Justice who appointed Mitra J. under Sec. 575 of the Code of Civil Procedure, to decide it as the third Judge on the 18th July 1908.

Mr. B. Chakraverti (with him *Mr. Lahiri* and *Babu Mohini Mohun Chackerbutty*) for the Appellants relied upon his former argument.

Dr. Priya Nath Sen (with him *Babu Rajendra Chunder Guha* for *Babu Akhilbandhu Guha*) for the Respondents :—

The word कन्या in Manu's Text cited in Dayabhaga must be taken to mean *daughter* in the generic sense and not an *unmarried daughter* only. The text itself indicates that, for, if the word be taken to mean an *unmarried daughter*, then on the second interpretation of the text as given in the Dayabhaga, the expression तदपत्यस्य becomes incongruous ; it would be unmeaning to say that in default of the unmarried daughter of the rival *Brahmini* wife, the offspring of that unmarried daughter should inherit the property left by the deceased childless woman. This objection is conclusive, for you can not attach one meaning to the word कन्या on the first interpretation, and another on the second ; and the best way of solving a doubt about the meaning of the word used in a text is to be guided by the indications furnished by the text itself. Reference to this or that lexicon furnishes no sure guide ; for instance, Medini says that the word कन्या may mean any *woman*. The word primarily means 'an unmarried woman' and not an 'unmarried daughter ;' it can not be said that the word bears that sense in the text cited, for, were it so, any unmarried *Brahmini* woman might claim the property ; therefore the word must be interpreted to have a secondary sense ; that is, either the sense of unmarried daughter or the sense of daughter in general ; the word is used in both of these secondary senses by authoritative writers. See Mahabharata, Anushthan Parva, Chap. II, verses 38, 55 and Chap. IV, verse 22 ; Ramayana, Bala-kanda, Chap. XXXV, verse 15 ; compare also Kalidas's Kumar Sambhava दक्षस्य कन्या भव पूर्वं पत्नी. In these passages the word कन्या has been used in the sense of daughter generally.

[MITRA J.—These passages do not prove much. They only show that the word कन्या is used to mean 'born of a particular person'.]

So the word कन्या in Manu's text, he submits, means 'a woman born of a particular person,' *i. e.* a daughter in the generic sense.

Now, taking the word in the secondary sense, one has to choose between the two senses noticed above, and for this purpose the first criterion is to refer to the indication furnished by the text itself, which, as submitted, supports his contention. Sarvajnanarayana in his commentary on Manu distinctly says that the word कन्या here means any daughter (see Mandalik's Manu Vol. II page 1216.) The other commentators also have adopted the same interpretation, for not only do they desist from saying that the word कन्या here means an unmarried

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daughter, but they adopt the second interpretation given in the Dayabhaga and explain तदपत्यस्य as referring to the offspring of the कन्या thereby indicating that the latter word does not mean an unmarried daughter only. Referring to Mitakshara it will be found that Vijnaneswara uses the word दुहिता as an equivalent for the word कन्या in explaining this very text. (Mitakshara, Bombay Edition); Viramitrodaya also does the very same thing (Golap Chunder Sarkar's Edition, Chap. V Pt. 2, Sect. 5). These works, therefore, all support his interpretation. Dayabhaga itself in expounding the second interpretation says सपत्नी दुहिता ब्राह्मणी कन्याद्वरेत् wherein the words दुहिता and कन्या are used as equivalents. If the contention of the other side were correct, why did not Dayabhaga qualify the word दुहिता by adding an adjective अनूदा (unmarried).

As regards the commentaries on Dayabhaga published in Prasanna Kumar Tagore's Edition, a careful reading will show that all the commentators excepting Srikrishna support my contention. Even Srikrishna changed his opinion in his Dayakrama Sangraha. The original passage in the Dayakrama Sangraha makes it quite clear that with regard to all kinds of विद्वत्त Stridhana property the daughters inherit before the sons. Dayatattwa is also clearly in his favour; so also Jagannath's view.

As regards translators, Sir William Jones in his translation of Manu, and Colebrooke in his translation of Dayabhaga translate the word कन्या used in this connection by the word 'daughter.' It is true in some other passages of Dayabhaga, Mr. Colebrooke takes the word कन्या to mean an unmarried daughter, but that is not at all against me. Mr. Colebrooke was a great Sanskrit Scholar and knew that the word sometimes meant *unmarried daughter* only; why then does he not adopt the same meaning in translating this passage? He must have had very good reasons for doing so. Authorities, therefore, clearly preponderate on his side. In the recent Privy Council case of *Radha Prosad Mullik v. Ranimoni Dassi* (1) their Lordships partly base their decision on the ground that in the case of विद्वत्त Stridhana of a daughter, her daughters succeed under the ordinary Hindu Law in preference to the sons. This also supports his contention.

C. A. V.

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Mitra J.—The decision of the question of Hindu law raised in these appeals depends on the interpretation of Chapter IV,

(1) (1908) 8 C. L. J. 48.

Section II, para 16 of the Dayabhaga of Jimuta Vahana, the paramount authority in the Bengal School. Other authorities may be followed, if there be any ambiguity in Jimuta Vahana's text. Srikrishna and Raghu Nandana undoubtedly deserve the greatest respect, but their opinions must yield to the authority of their great master, Jimuta Vahana, himself.

Chapter IV, section II, para 16 of the Dayabhaga of Jimuta Vahana is as follows in Colebrooke's translation: "As for a passage of Manu, 'The wealth of a woman, which has been in any manner given to her by her father, let the Brahmini damsel take; or let it belong to her offspring;' since the text specifies 'given by her father,' the meaning must be, that property, which was given to her by her father, even at any other time besides that of the nuptials, shall belong exclusively to her daughter &c." The text of Manu referred to in the paragraph is thus in original:—

स्त्रियास्तु यद्वैदितं पित्रा दत्तं कथंचन ।

ब्राह्मणी तद्वैदित्या तदपत्यस्य वा भवेत् ॥ Chapter IX. V. 198.

The word "damsel" in the translation by Colebrooke represents the word "कन्या" in the original text. In Jimuta Vahana's commentary on it in para 16, he also uses the word "कन्यायाः ।" In the next sentence in that paragraph, he uses the words "सपत्नीदुहिता ब्राह्मणी कन्या ।" In this last sentence, the word "दुहिता" is evidently used in contradistinction to the word "कन्या"

The question then arises—In what sense has the word "कन्या" been used by Manu and Jimuta Vahana? The arguments before me, as well as those before my learned colleagues, (Brett and Coxe JJ). related principally to the meaning of the word "कन्या" and the sense in which it was used by Jimuta Vahana. Does it mean an unmarried daughter, or daughters generally?

The word "कन्या" primarily means a *maiden daughter*, a *virgin* "कुमारी" (*kumari*). That is the interpretation of the word given by the celebrated lexicographers *Amara Singha* and *Hem Chandra*. In the *Medini* also, the first synonym of "कन्या" is "कुमारी" *maiden daughter*. The same meaning is given in the *Sabdakalpadruma* by Raja Sir Radha Kanta Deb Bahadur, and all the later lexicographers. Professor H. H. Wilson in his Dictionary also gives the same meaning—"A maid, a virgin, a girl of nine or ten years of age." Later writers have occasionally used the word to mean "a woman" i.e., "नारी"—from the particular to the general. But that is not the meaning of the word as used in the *Smritis*. To illustrate the primary meaning, "virgin", of the

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word, the learned author of the Sabdakalpadruma has cited a significant passage from the *Vanaparva* in the Mahabharat, showing the root and inflexion of the word and its meaning *kumari*—"कुमारो." He gives the secondary meaning "woman" (नारी) following the earlier lexicographers. Sir Greaves Haughton in his Dictionary confines the meaning to a "maid, a virgin, a young woman." In fact there can be no doubt as to the meaning of the word as used in earlier sanskrit literature and law. The genus (woman) for the species (virgin) is of later use.

I have not been able to find the word used in its wider sense anywhere in Manu. The word "दुहितृ" means daughter, married, unmarried or widow. All female children are daughters, "दुहितृ". The word includes in its significance, "कन्या" and the lexicographers I have referred to, are unanimous in this respect. Amar Singha, Hem Chandra as well as Medini also give the wider meaning of the word *kanya*, but they do not give the synonym to be *duhitrī*. they give the word woman (नारी). When Jimuta Vahana uses the words "सपत्नीदुहिता ब्राह्मणो कन्या" in paragraph 16, he must have used the word "दुहितृ" in its appropriate sense of daughter and the word "कन्या" as included in the genus "दुहितृ." The word "कन्या" occurs also in paragraphs 6 and 7 of the same chapter and section. In para 6 the text of Devala is cited "सामान्यं पुत्रकन्यानां स्त्रियां स्त्रीधनं स्त्रियाम्" and in para 7 the word is interpreted to mean, as it must "कुमारो।" In both the paragraphs, Colebrooke's translation of the words is "unmarried daughter." I am not disposed to come to the conclusion that the same word was used by Manu and Jimuta Vahana in an unusual sense in Chapter IX. V. 198, and paragraph 16 respectively. Such use would be inconsistent with its use in other parts of their great works.

Of the commentators on Manu's text, Kulluka carries the greatest weight. He seems to be of opinion that unmarried daughter first succeeds, and on her default, the sons of the deceased. He lays down distinctly that in the presence of both an unmarried daughter and sons, the former should be preferred and the sons follow the maiden daughter. This seems to be also the opinion of Manu's commentators, Raghavananda, Nandari and Ram Chandra, but Sarvajna Narayan may appear to be of a different opinion. The latter says "कन्यानि दुहितृ मातृ परम्"—i.e. word *kanya* is used for daughters generally. But Sarvajna Narayan's authority has never been recognised in Bengal as superior to Kulluka's and the sentence itself is very vague.

The commentators of Dayabhaga, Srinatha, Ram Chandra, Maheswara, Achyutananda, Raghunandana and Srikrishna, interpreted the word "कन्या" in the text as having its ordinary meaning *unmarried daughter*. Srikrishna is abundantly clear in his commentary as has been pointed out by Brett and Coxe JJ. Srikrishna, and Raghunandana subsequently, laid down in their respective treatises a different rule of succession, as if the word "कन्या" might mean daughters generally. In a conflict of authorities, however, Jimutavahana must be preferred. The later opinions of Srikrishna and Raghunandana which are not based on the text of the Dayabhaga ought not to be followed by the Courts in Bengal.

Macnaghten (Principles of Hindu Law pp. 39-40), Strange (Vol. I p. 251, and Vol. II p. 403), Shama Churn (Vyavastha Darpana p. 806, 1st Edition ; p. 717-8 2nd Edition), and Elberling have followed Srikrishna's commentary on the Dayabhaga and not his individual opinion as given in the Dayakrama Sangraha. The order of succession—maiden daughter, son and other daughters—was accepted by all Anglo-Indian Text writers until a cloud was thrown in the third Edition of Shama Churn's Vyavastha Darpana published after his death. Sir Gooroodas Banerjee in his learned work on the Hindu Law of marriage and stridhana (p. 408, 2nd Edition) seems to be of opinion that Srikrishna did not follow Jimutavahana as regards succession to *pithudatta* stridhana. Raghunandana in his *Dayatattwa* did not also follow the Dayabhaga.

I am of opinion that we should follow the Dayabhaga and not Srikrishna and Raghunandana, when it is evident that the latter have not followed their master in giving preference to daughters generally. I am confirmed in my view by what Rampini and Mookerjee JJ. have said in *Ram Gopal Bhattacharyya v. Ngram Chandra Bandopadhyaya* (1) I agree, therefore, with Brett J.

The result is that the appeals will be decreed with costs in all the Courts.

A. T. M.

Appeals decreed.

(1) (1905) 3 C. L. J. 15(24) ; I. L. R. 33 Calc. 315 (325).

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PRIVY COUNCIL.

PRESENT :—*Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble and Sir Arthur Wilson.*

SANKARALINGA NADAN AND OTHERS

v.

RAJA RAJESWARA DORAI *alias* MUTHURAMALINGA
DORAI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Trustee, suit by—Decree in plaintiff's favour—Appeal by defendants—Plaintiff's application to alter the judgment so as to defeat his own action—New plaintiffs, joining of—Surrender of a decree in his favour by a trustee—Betrayal of trust—Refusal of the Court to alter the decree.

The plaintiff, the hereditary trustee of a temple dedicated to the worship of Shiva and where the customary ceremonies of Hindu worship were carried on sued the defendants, who represented a caste called the Nadar or Shanar caste. The question between the parties was whether the defendants and the caste to which they belonged had legal right to enter and worship in the temple. The first Court decided against the defendants, who thereupon appealed to the High Court. The plaintiff thought fit to profess that he then saw that he and the Judge of the lower Court were wrong and asked the High Court that the judgment of the lower Court should be altered so as to defeat his own action. The High Court, on being applied to, as their Lordships held very properly, reinforced the cause of the worshippers of the temple by joining certain new plaintiffs to the original plaintiff (whose confidence in the justice of his suit had by that time convalesced). The High Court refused to alter the decree and their Lordships held, correctly.

The compromise by the trustee was not *bonafide* and not lawful within the meaning of section 375 of the Civil Procedure Code. The decree of the first Court did not cease to be binding upon the parties by the mere fact of appeal though the pendency of the appeal opened the whole question for the appellate Court. A trustee who gives up the right under the decree under appeal is guilty of breach of trust.

Appeal from a decree of the High Court of Judicature at Madras (Benson and Boddam JJ.) (1), dated the 14th February 1901, affirming a decree of the Court of the Subordinate Judge of Madura, East, (July 20, 1899).

The principal question involved in the appeal was whether the appellants and other persons of the caste to which they belonged were prohibited from entering into and worshipping in the Hindu temple of Minakshisundareswaral, situate in the town of Kamuti.

On July 5, 1908, Raja M. Bhaskara Sethupathi instituted

(1) Reported in (1901) 12 M. L. J. 360.

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the suit in the Court of the Subordinate Judge of Madura (East). He was the zemindar of Ramnad, and, as such, he was the hereditary trustee of the temple at Kamudi in the Madura District in which Siva was worshipped under the form of Minakshisundareswarae. The defendants (the present appellants) were residents of Kamudi, and belonged to the Nadar or Shanar community. They were sued as representing that community under the procedure laid down by section 30 of the Civil Procedure Code. The plaint alleged that the Shanars, as a caste, were prohibited both by custom and by the shastras from entering the plaint temple, but that, on May 14, 1897, the appellants forcibly entered the temple in procession with music and torches and performed acts of worship, and thereby polluted the temple and caused obstruction to the lawful worshippers. The plaintiff, therefore, prayed for a declaration that "neither the defendants nor other Shanars are entitled to enter into any part of the said temple"; for a perpetual injunction to restrain them from so doing; and for the payment of Rs. 2,500 as damages.

The appellants, by their written statement, denied the acts of sacrilege alleged and claimed that "according to the Shastras and custom these defendants have a right to use the plaint temple and to participate in the *pooja* and worship therein performed, in the same manner and to the same extent as any other class in the place (Brahmins excepted) and have been from time immemorial exercising such right and participating in the *pooja* and worship therein." They admitted having entered the temple on May 14, 1897, and worshipped there in accordance with custom. They also denied the plaintiff's right to exclude them.

On July 20, 1899 the Subordinate Judge delivered his judgment. He found that the appellants had not been allowed to use the plaint temple in the past for worship; that the custom set up by them, in support of the right of entry, had not been made out, and that they belonged to a class which, under custom and the Shastras, were precluded from entering the plaint-temple which was governed by the ritual prescribed in the Saiva Agamas adopted as authoritative and current in the Madura District. A decree was accordingly passed whereby it was "declared, ordered and decreed that neither the defendants nor the other members of their community living at Kamuty are entitled to enter into any part of the temple of Minakshi Sundareswara at Kamuty subject to the trusteeship of the plaintiff and in his possession, that a permanent injunction be issued restraining the

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defendants and their fellow castemen at Kamuty from entering the said temple or any part thereof and that the defendants do pay plaintiff on account of the temple and for the performance of the necessary purificatory ceremonies a sum of Rs. 500 and that each side do bear its own costs.'"

Against that decree the appellants appealed to the High Court of Judicature at Madras.

On May 2, 1901, a petition signed by the plaintiff and the appellants, was preferred, on behalf of the latter, to the High Court, in which it was stated that the parties had effected a compromise of the matters in dispute in the appeal, and prayed that the compromise might be recorded, and a decree passed in accordance therewith, in supercession of the decree of the Court of the Subordinate Judge.

The material part of the agreement of compromise, a copy of which was annexed to the petition, was as follows :—

"Whereas the plaintiff instituted the above suit and obtained a decree therein declaring that neither the defendants nor other members of their community living at Kamuty are entitled to enter into any part of the temple of Minakshisundareswaral at Kamuty, subject to the trusteeship of the plaintiff and in his possession and permanently restraining the defendants and their fellow castemen at Kamuty from entering the said temple or any part thereof and awarding plaintiff Rs. 500 by way of damages, and the defendants have preferred the said appeal No. 11 of 1900 against that decree to the High Court of Judicature at Madras and it is extremely uncertain as to what the result of the said appeal will be, whereas the plaintiff on full and further enquiry is satisfied that as a matter of fact the defendants and their caste people have enjoyed the right of access to and of worshipping in the temples of Ramnad Zemindary including the plaint temple at Kamuty in the same manner and to the same extent as the Vellala, Chetti and other Sudra sects of the Hindu community have enjoyed and that the defendants' caste people have always enjoyed and do still enjoy the aforesaid right of access and worship with reference to similar temples situated elsewhere than in the Ramnad Zemindary, whereas the plaintiff is advised and instructed that according to the Hindu Sastras the people of defendants' caste are entitled to the said right of access and worship with respect to all Hindu temples and whereas the plaintiff has ascertained that the sentiments of the general body of the Hindu community are in favour of the defendants'

caste people exercising their said right of access and worship in respect of all Hindu temples, it is hereby agreed as follows :—

"First, the plaintiff shall not exclude the defendants and their caste people from exercising their right of free access to and of worshipping in the said temple of Kamuty but shall allow them to enjoy and exercise their said right of free access, and worship in the same manner and to the same extent as such rights are enjoyed and exercised by Vellala, Chetty, and other Sudra sects of the Hindu community.

"Secondly, the defendants shall enjoy and exercise their said rights in the same manner and to the same extent as the aforesaid sects of the Hindu community enjoy them, and that they have no higher rights of access and worship in respect of the temple, and that the defendants are not liable to pay the plaintiff any sum of money by way of damages, and Thirdly, each party shall bear their own costs of the suit and the appeal. It is further agreed that the plaintiff and the defendants shall present a joint petition or petitions to the High Court praying that the said decree in O. S. No. 38 (*sic*) of 1898 on the file of the Subordinate Court of Madura (East) be reversed and that a decree be passed in accordance with the terms of this agreement."

On May 14, 1901 one Narayanasami Gurukul applied to be made a respondent in the said appeal in order to oppose the said compromise ; on May 29, 1901, one Vallasamy Thever made a similar application ; on July 18, 1901, Raja Rajeswara Dorai *alias* Muthuramalinga Dorai, the infant son and heir of the plaintiff by his mother and next friend, made an application of a similar nature. In the affidavits filed in support of those applications it was asserted that the plaintiff received monetary consideration for compromising the suit and that the compromise was fraudulent. On September 18, 1901, the High Court made an order directing that the three applicants should be brought on record as co-plaintiffs. At the hearing the High Court was informed that the plaintiff wished to withdraw from the compromise and intended to oppose it. The following paragraphs occur amongst those giving reasons in support of that order :

"In support of the present petitions affidavits have been put in alleging, *inter alia* that the plaintiff has been influenced by corrupt motives, and by false representations, to enter into a compromise.

"With regard to these allegations, we may say at once that they are made in such terms as to be quite worthless. The charge

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of corruption is made in paragraphs 10 and 13 of the affidavit of Narayanaswami Gurukul in which he says "I am given to understand &c." and 'I am credibly informed and believe &c,' 'but the name of the informant or the source of the information is not given. Such an affidavit is perfectly worthless and if it were necessary for the petitioners to show corruption on the part of the plaintiff, or that he made the compromise owing to false representations, we would regard the allegations as not made out by the affidavits and we would dismiss the petitions.

"Apart, however, from these special allegations, we think that a recital of the admitted facts of the litigation are sufficient to justify us in making the petitioners parties."

* * * * *

"The first petitioner is an hereditary officiating priest of the temple, the second is a large land-holder of the locality, the third is the son of the plaintiff. All are worshippers in the temple, and interested in its being kept free from defilement, and the plaintiff's son claims a special interest as being entitled to succeed the plaintiff as hereditary trustee. The petitioners are clearly all beneficiaries who are interested in the trust property regarding which the suit was filed. Section 437, Civil Procedure Code, provides that 'in all suits concerning property vested in a trustee, when the contention is between the persons beneficially interested in such property and a third person, the trustee shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may if it thinks fit, order them, or any of them, to be made such parties.' The last clause is taken from 15 and 16 Vic. C. 86 & 42 Rule 9 and the beneficiaries are made parties in England when the trustee is either wholly uninterested or is adverse to their interest (*Clegg v. Rowland* L. R. 3 Eq. 373, *Payne v. Parker* 1. Ch. App. 327). In the former case Vice-Chancellor Malins said 'In all cases where the Court sees trustees are wholly uninterested in the matter and there are parties who are materially interested in the question, it will never make a decree in the absence of those parties who are alone interested in the contest, but will have them brought before the Court in order that those who are interested in resisting the demand, may resist it at the proper time, which is the hearing of the cause.' We think that the principle is applicable to the present case and that we ought not to refuse to allow the petitioners to come in as parties

in order that they may be at liberty to show, if they can, that the Court ought not to pass a decree in accordance with the compromise, which, as they allege, is injurious to their interests, and which certainly gives up all that plaintiff has hitherto contended for on their behalf.

"As regards the appellants' second objection *viz.*, that the petitioners, if made parties, should be joined as plaintiffs in the suit and not merely as respondents in the appeal, the petitioners have now before us expressed their willingness to be joined in this way." The petitioners have also agreed that, if joined, they will not claim a re-trial of the suit, but will be bound by the decision of this Court in disposing of the appeals. We resolve therefore to allow the petitions to be amended by substituting in each the words 'as a Co-plaintiff' for the words 'as a party respondent in the appeal' and we direct that thereupon the petitioners be joined as co-plaintiffs in the suit on the clear condition that they will not ask to have the suit retried but will be bound by the decision in appeal."

The petition of May 2, 1901, praying for a decree in accordance with the terms of the compromise then came on for hearing. It was supported by the appellants alone, and opposed not only by the newly joined plaintiffs, but also by the original plaintiff, who expressed a desire to withdraw from the compromise. On September 25, 1901, the High Court dismissed the petition and made an order refusing to act on the compromise on the ground that it was a breach of trust on the part of the trustee of the temple, and as such was unlawful under the provisions of section 375 of the Civil Procedure Code. Benson and Boddam, JJ. who made the order, after stating the facts, observed that the mere withdrawal of the original plaintiff who signed the compromise would, by itself, be no ground for refusing to give a decree in accordance with it (I. L. R. 8 Mad. 482 and 9 Mad. 103) and proceeded as follows.

"Considering the evidence on the record as to the manner in which the claims of the Shanars are viewed by the non-Shanar castes it is not easy to reconcile this *volte face* with *bona-fides* on the part of the plaintiff.

"The petition recites that the change of view is the result of 'full and further enquiry,' but there is nothing to show how or when this was made, and the fact that the plaintiff now desires to withdraw from the compromise goes far to show that the allegation is without foundation. But even if the proposal to com-

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promise were the result of an honest change of view on the part of the 1st plaintiff, that would not, in our opinion, affect his power to enter into such a compromise. In our opinion the proposed compromise must be regarded as essentially involving a breach of trust on the plaintiff's part. He is not acting in this matter for himself alone, nor is he dealing with his own property. He is acting for the general body of worshippers in the temple, and he is dealing with what are matters of the most vital interest to them.

"It has been judicially established before the Subordinate Judge that the defendants 'belong to a class which under custom and the Shastras are prohibited from entering the plaint temple' and that their having done so caused defilement which necessitated the purificatory ceremonies.

"That finding is binding on the plaintiff as well as on the defendants, and he cannot take upon himself to say 'I have made further enquiries. I am satisfied that the finding of the Court is wrong. I shall, therefore, allow the Shanars to enter the temple.'

"To do this would be to ignore and alter the fundamental character and uses of the temple as ascertained by judicial authority. It is not in the power of the trustees to do this. This principle was laid down by Lord Chancellor Eldon in the case of the Attorney General *v.* Pearson (17 Revised Reports 101) in these words:—'Where an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the Court can find no other means of deciding the question, than through the medium of an enquiry into what has been the usage of the congregation in respect to it; and, if the usage turns out upon enquiry to be such as can be supported, I take it to be the duty of the Court to administer the trust in such a manner as best to establish the usage considering it as a matter of implied contract between the members of that congregation. But if, on the other hand, it turns out that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members, 'We have changed our opinions and

you, who assemble in this place for the purpose of hearing the doctrines, and joining in the worship, prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our opinions.'

"These words, no doubt, were used with reference to the regulation of religious trusts in England by the Court of Chancery, but we apprehend that, *mutatis mutandis*, the Court will be guided by the same principles in this country. Where an institution exists for the purpose of religious worship but the exact form of worship, or the class for whose benefit it was established, cannot be discovered from the instrument creating the trust, (or where, as in the present case, there is no such instrument) the Court can find no other means of deciding those questions than through the medium of an enquiry into what has been the usage of the worshippers in respect thereto, and, if the usage is a lawful one, it is the duty of the Court to support that usage on the suit, legally instituted, of any person interested. It is not in the power of individuals having the management of the institution to alter the purpose for which it was founded, or to say to the other worshippers 'We have changed our opinions, and you who resort to this place for the purpose of worshipping in the customary manner, shall no longer enjoy the benefit intended for you unless you conform to the alteration which has taken place in our opinions, even to the extent of submitting to the presence of other worshippers who are prohibited by custom and the Shastras from entering into the temple.' It is not in the power of any trustee to say this to the other worshippers in a temple. On the contrary, it is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so, he is in our opinion, guilty of a breach of trust, and, still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it.

"The defendants, however, contend that as the decree of the Subordinate Judge in this case, is under appeal, the appeal opens up the whole question as to whether the Shanars are, or are not, prohibited from entering into, and worshipping in, the temple, and there is no binding decision as to what the usage is, and therefore no breach of trust on the 1st plaintiff's part in making the agreement to admit the Shanars to the temple.

"This contention, it seems to us, rests on a fallacy, and is invalid. The appeal, no doubt, opens up the whole question for

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the decision of the appellate Court, but, pending that decision, the decree of the Subordinate Judge does not cease to be binding on the parties. Pending that decision, they are just as much bound by the decree as if there was no appeal. In view, then, of the finding of the Subordinate Judge that the Shanars are prohibited by custom and by the Shastras from entering the plaint temple, we must hold that the proposed compromise by the 1st plaintiff involves a breach of trust on his part and is therefore not a lawful compromise within the meaning of section 375 of the Code of Civil Procedure."

On February 14, 1902, the High Court delivered its judgment in the appeal and found that a custom excluding Shanars from the temple was proved; that the custom was supported by the original low occupation of and estimation in which the Shanars were held; and also by the prohibition contained in the Agama Shastras, prevalent in the Madura District against the entry into a Siva temple of persons whose profession was the manufacture of intoxicating liquor and climbing palmyra and cocoanut trees. In the result a decree was made dismissing the appeal with costs.

Against that decree the appellants preferred an appeal to His Majesty in Council. The original plaintiff, having died was represented on the record by his son Raja Rajeswara Dorai *alias* Muthuramalinga Dorai, who became the hereditary trustee of the temple and had already been joined as a co-plaintiff.

Mr. De Gruyther, K. C. and Mr. Kyffin, for the appellants contended that the compromise was binding on the respondents and ought to have been enforced by the High Court; that the Court of appeal could not substitute new plaintiffs for the original plaintiff; that the Courts in India had wrongly held that Nadars as a caste were prohibited by custom from use of the temple; that the Courts in India had wrongly held that Nadars and Shanars belonged to the same caste and that they were a low caste and did not belong to the twice-born classes; and that Courts in India were in error in finding that members of the Shanar caste were not allowed by the Agama Shastras to worship in a Siva temple.

Mr. Cohen, K. C. and Mr. Brown, for the respondents were not called upon.

LORD ROBERTSON: Their Lordships would humbly advise His Majesty that the appeal ought to be dismissed for reasons to be stated later on.

Their Lordships' judgment giving reasons for their report was delivered by

Lord Robertson.—The question between the parties is whether the appellants and the caste to which they belong have legal right to enter and worship in a temple at Kamuty. This temple is dedicated to the worship of Shiva, and the customary ceremonies of Hindu worship are there carried on. It is common ground between the disputants that the appellants represent a caste called the Nadar or Shanar caste. It is alleged by the respondents that the presence of persons belonging to the appellants' caste is repugnant to the religious principles of the Hindu worship of Shiva and to the sentiments of the caste of Hindus who worship in this temple, and that it is contrary to custom in this temple. Both Courts in India have decided against the appellants, the judgment of the Subordinate Judge discussing the question in great detail and with much research, and the High Court at Madras resting their decision upon extremely comprehensible and cogent grounds.

The controversy touches, but does not involve, delicate and abstruse questions of Hindu religious doctrine. In the view of their Lordships, it admits of decision upon a much more palpable and limited range of facts.

First of all, the appellants, as matter of fact, worship by themselves in a temple of their own. Second, the result of the evidence is a complete failure to prove any resort by persons of the appellants' caste to the temple in dispute. Those two facts not merely negative the case of the appellants that they "have been from time immemorial.....participating in the *poorja* and worship" in the disputed temple, but they make easy the respondents' further contention that this separation in worship between the two classes was not accidental or voluntary, but rested on a deeper ground.

The evidence has been admirably analysed by the High Court, and their appreciation of the quality of the evidence, on the one side and on the other, concurring as it does with that of the Subordinate Judge, is entitled to the greatest weight.

The argument addressed to their Lordships was directed rather against the soundness of the doctrine asserted by the respondents as involving the exclusion of Nadars, and it was endeavoured to show that there were inconsistencies in the respondents' treatment of the appellants in other respects. All this, however, as matter of theological argument, is too rational-

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istic ; while, on the other hand, it wanders from the region of fact and custom. What the respondents have succeeded in proving is that by custom the appellants are not among the people for whose worship this particular temple exists.

Their Lordships have spoken of "the respondents," generally ; but it is necessary to note the episode in the proceedings euphemistically described as "the compromise." The original plaintiff in the suit was the Rajah who was the hereditary trustee of this temple, which was the temple of one of the villages in his zemindari. After the case had been decided in his favour by the Subordinate Judge, this person thought fit to profess that he now saw that he and the Judge were wrong ; and he asked that the judgment should be altered, so as to defeat his own action. A very sordid motive for this surrender was specifically asserted and has not been disproved. The Court, on being applied to, very properly reinforced the cause of the worshippers of the temple by joining certain new plaintiffs to the original plaintiff (whose confidence in the justice of his suit had by this time convalesced). The principles applicable to the case of a trustee who thus betrays his trust by surrendering a decree have been well stated and applied by the High Court.

For these reasons, their Lordships, on the 16th June last, agreed humbly to advise His Majesty that the appeal ought to be dismissed, and ordered the appellants to pay the costs of the appeal.

J. M. P.

Appeal dismissed.

Mr. Douglas Grant : Attorney for the Appellants.

Messrs. Chapman—Walker and Shephard : Solicitors for the Respondents.

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

AKHIL DOME AND OTHERS

v.

RAM CHANDRA MANDAL.*

CRIMINAL,

1908,

May, 18.

Criminal Procedure Code (Act V. of 1898), section 528—Transfer of case by District Magistrate—Case remanded by Sessions Judge—Notice to accused person.

The District Magistrate has no jurisdiction to transfer a case from the file of a Subordinate Magistrate to whom it has been remanded by the Sessions Judge for further enquiry and less so, if he gives no notice to the other side.

Rule obtained by the accused persons.

Case under section 471 Indian Penal Code.

The material facts and arguments appear sufficiently from the judgment.

Babu Foy Gopal Ghosh for the Petitioners.

Babu Atul Krishna Roy for the Opposite Party.

The following judgment was delivered :—

In this case the Magistrate discharged a man charged before him under section 471 Indian Penal Code. On the matter coming before the Sessions Judge he directed that the case should go back to the Magistrate and that he should proceed with it from the point at which he had left off. The District Magistrate was applied to for transfer of the case and accordingly made the order which is the subject of this rule. By that order he doubted the legality of the order of the Sessions Judge, which he had no jurisdiction to do, and which order was in fact perfectly correct. He also transferred the case from the file of the Magistrate to whom the Sessions Judge had sent it by his order. This he had no jurisdiction at all to do. Not only had he no jurisdiction to act as he did, but he appears to have acted throughout without any notice to the other side.

The result is that this Rule must be made absolute and the order of the District Magistrate set aside, and if it is desired in any way to vary the order of the Sessions Judge that must be effected by an application to the Sessions Judge himself and not the District Magistrate.

N. K. B. *Rule made absolute. Order of transfer set aside.*

* Criminal Revision case No. 443 of 1908 against the order of D. Weston Esq., Magistrate of Midnapore, dated the 16th March 1908.

CRIMINAL,

1907.

May, 31.

Before Mr. Justice Mitra and Mr. Justice Caspers.

RAM NARAIN SAHU

vs.

KAILASH SINGH AND OTHERS.*

*Criminal Procedure Code (Act V of 1898), section 145—Division of crops—
Magistrate, jurisdiction of*

A Magistrate has no jurisdiction to order a division of the crops on the land, subject matter of proceedings under section 145, Criminal Procedure Code, between the parties.

Rule obtained by the 1st Party.

Proceedings under section 145 Criminal Procedure Code.

The material facts appear from the judgment.

Babu Makhan Lal for the 2nd Party.

Babu Dasarathi Sanyal for the 1st Party.

The Judgment of the Court was delivered by

Mitra J.—These are two rules arising out of the same order of the Sub-divisional Magistrate of Sasaram dated the 20th March 1907. There was a dispute as to the possession of land, but no proceeding under Section 145 Criminal Procedure Code, was drawn up in the matter before the 29th January 1907. Crops on the land in dispute were then ripe and fit to be reaped and they were actually reaped. The Subdivisional officer, in order to avoid a breach of peace, attached the paddy and kept it in Police custody and directed the parties to go to the Civil Court to establish their right to it. He had no authority under the law to do so. He discovered his mistake and on the 29th January 1907 he drew up a proceeding under Sec. 145 Criminal Procedure Code. The materials before the Court clearly shew that there was a dispute between the parties which might result in a breach of peace.

We think that the irregularities of the previous proceedings do not vitiate the order of the 29th January 1907. This is not a case in which it can be said that there was no material before the Court to come to the conclusion that there was a likelihood of breach of peace.

We accordingly discharge the first Rule, *i.e.*, Rule No. 398.

The second Rule (Rule No. 505) was issued at the instance of the party declared to be in possession. The Sub-divisional Magistrate directed that the crops which had already been in his custody should be divided half and half between the parties and

* Criminal Rules Nos. 398 and 505 of 1907 against the order of *Babu Brij Bansi Sahai*, Sub-divisional Magistrate of Sasaram, Shababad, dated the 20th March 1907.

if the second party did not agree to accept the half, the whole of the crop should be made over to the first party.

A Magistrate dealing with a case under Section 145 Criminal Procedure Code, cannot direct division of the crops. The party declared to be in possession of the disputed land is entitled to the crops attached under Sub-section 4 of Section 145, Criminal Procedure Code. The portion of the order which relates to the division of the crops is therefore set aside. The second Rule (No. 505 of 1907) is accordingly made absolute.

Rule No. 398 discharged.

Rule No. 505 made absolute.

N K B

Before Mr Justice Gault and Mr Justice Woodroffe

*In re JALIL AND OTHERS **

Criminal Procedure Code (Act V of 1898). S c. 122—Security for good behaviour—Unfit—Discretion of Magistrate.

The 'unfitness' of a surety under section 122, Criminal Procedure Code, is not limited to pecuniary unfitness.

The question as to whether a particular person is 'fit' or not is for the Magistrate to decide. The matter is left to his discretion, which is not fettered in any way.

Abinash Malakar v. Empress (1) and Ram Pershad v. The King Emperor (2) distinguished.

Rule obtained by the persons ordered to find security for good behaviour.

The petition was directed only against the portion of the Magistrate's order by which he refused to accept as fit the persons tendered as sureties.

Babu Sarat Chandra Lahiri for the Petitioners.

The following judgments were delivered :

Woodroffe J.—In this case, the Magistrate says that in his opinion the sureties appear to be unfit. This is a case of sureties for good behaviour.

Section 122, Criminal Procedure Code, says that a Magistrate may refuse to accept any surety for good behaviour offered under this Chapter on the ground that, for reasons to be recorded by the Magistrate such surety is an unfit person. The Magistrate therefore has to determine in each case whether a person offered

*Criminal Rule No. 89 of 1908 against the order of V. Dawson Esq., Sub-divisional Magistrate of Narayangunge, Dacca.

(1) (1900) 4 C. W. N. 797

(2) (1902) 6 C. W. N. 593.

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as surety is a fit or unfit person : and as regards this matter, the Legislature has given him a discretion. The Legislature has not particularised any kind of unfitness. It has left the matter to the discretion of the lower Court, though this Court will in a case consider, (according to its own circumstances), whether the order passed by the Magistrate is a reasonable order to make or not.

In my opinion this is not a case in which we should interfere. It has, however, been suggested that we are bound to do so by virtue of two reported decisions which have been cited to us. The first is contained in *Ram Pershad v. The King Emperor* (1) and the other in *Abinash Malakar v. Empress* (2). In my opinion, in all cases, what we should first look to, are the words of the Statute itself. I doubt whether a reported decision upon a matter of the kind, now before us is binding, unless possibly where the circumstances are in all respects the same as those referred to in the reported decisions which are relied upon as an authority.

However that may be, I am of opinion that these two cases do not conclude us. In the first place, I have to point out that the decision in *Ram Pershad v. The King Emperor* (1) is *obiter dictum*. The learned Judges say this that under the circumstances stated they have no alternative but to discharge the Rule. They then proceed with certain observations which have been relied upon. They say also this that "as regards the question of residents or non-residents, we may refer the Deputy Magistrate to the case of *Abinash Malakar v. The Empress*." (2) If we refer to that case, we find that the learned Judges there decided on the facts of that particular case that the Magistrate was not justified in refusing the sureties simply because they lived at a great distance from the house of one Abinash Malakar and therefore they could not be expected to exercise due supervision over his doings. They considered in that case that the reasons were not sufficient to refuse the sureties. They then make certain general observations which if binding at all upon a matter which is one of discretion, bind only upon the same state of facts. The facts are however not the same here. The Magistrate considers having regard to all the circumstances, one of which is the question of control, that the persons offered as sureties are no fit persons and has refused to accept them.

I would, therefore, discharge the Rule.

Geidt J.—I agree.

I am unable to accede to the contention of the learned
(1) (1902) 6 C. W. N. 593. (2) (1900) 4 C. W. N. 797.

pleader who has appeared for the petitioner that the word "unfit" in Sec. 122 Criminal Procedure Code has reference only to the pecuniary position of the person who offers himself as surety. The word 'unfit' does not, in ordinary language, connote that idea. If we look at Sec. 513 Criminal Procedure Code we find that whereas in an ordinary case a Magistrate may accept a deposit of money in place of a surety, an exception is made, where a person is called on to furnish security for good behaviour. In my opinion, the unfitness referred to in Sec. 122 Criminal Procedure Code, though it may not exclude the idea of pecuniary unfitness, is more concerned with the idea of moral unfitness. I therefore agree with the order proposed by my learned brother.

N K B. *

Rule discharged.

CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Mookerjee

OMATUL MEDHI

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Land Registration Act (VII B. C. of 1876), Secs. 42, 48, 52, 55—Registration of name, Collector's power to order—Conflicting claims—Reference to Civil Court what to state—Possession—Widow in possession in lieu of dower—Reference, irregular and contrary to Law—High Court's power of revision—Civil Procedure Code (XIV of 1882) Sec. 622—Other remedy open to aggrieved party.

Before a Collector can order the name of an applicant to be registered under the Land Registration Act as proprietor of an estate or of any interest therein, he must satisfy himself that the possession exists or that the alleged succession or transfer has taken place and that the applicant has acquired possession in accordance with such succession or transfer but not otherwise. The determination of the question of possession alone is sufficient when the applicant claims to have assumed charge as joint proprietor on behalf of his co-sharers or as manager. When the applicant claims to be proprietor by succession or transfer, the Collector has to satisfy himself that the succession or transfer has taken place and that the applicant is in possession accordingly. In this latter case, the applicant can not succeed unless both the elements are established.

If there is a dispute as to the possession, succession or acquisition by transfer, by the applicant, of the extent of interest in respect of which he has applied to be registered, the Collector should, in the first instance, try to satisfy himself, whether any person is in possession of the interest in dispute. If it is

* Civil Rule No. 2251 of 1907, against the decision of Babu A. O. Batabyal, Subordinate Judge of Patna, dated the 29th June 1907.

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not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute, the Collector may adopt one of two courses. He may either himself determine summarily the right to possession, deliver possession accordingly, and make the necessary entry in the Register or he may make a reference to the Civil Court which may determine summarily the right to possession and deliver possession accordingly.

Bushby v. Dixon (1) distinguished.

It is not enough for the Collector to repeat the language of Section 55 of the Land Registration Act and to say that in his opinion the dispute ought to be properly determined by a Civil Court. He must state that it is not proved to his satisfaction that any person is in possession of the interest in dispute.

When a person has proprietary interest in land and as such is entitled to receive rent, he is in possession of his interest if he is in receipt of rent, while his tenant who is in actual occupation has possession which, in a sense, is the possession of the landlord or superior proprietor.

Secretary of State v. Krishnamoni (2) referred to.

Where the order of reference by the Collector to the Civil Court shows on the face of it that he did not direct his attention to the question whether any person was in possession of the interest in dispute

Held—That the reference was irregular and in contravention of the provisions of section 55 of the Land Registration Act.

When a Civil Court finds upon the facts that a Mahomedan widow is in possession of the disputed property, as proprietor, by receipt of rent, that she is entitled to a large sum of money from the estate of her husband on account of her dower and that she peaceably entered into possession upon the death of her husband and claimed to hold possession not as a wrong-doer but upon an assertion of title which is *prima facie* well founded in law, it exercises jurisdiction illegally and with material irregularity when it makes an order the effect of which is to determine the question of title and to oust her from possession.

Though the Civil Court acquires jurisdiction by virtue of the reference made by the Revenue Court, yet once it has got seisin of the case, it exercises its power as a Civil Court, and its decision is a decision of an ordinary Civil Court. Hence, the High Court has jurisdiction to interfere either under section 622, Civil Procedure Code, or under section 15 of the Charter Act.

The High Court can interfere under section 622, Civil Procedure Code, even though the aggrieved party has other remedy available.

Debi Das, v. Fiaz Hussain (3) referred to.

Rule obtained by the Objector.

The facts of the case and arguments appear sufficiently from the judgment of the Court.

(1) (1824) 8 B and C. 298, 27 R. R. 362.

(2) (1902), I. L. R. 29 Cal. 518; L. R. 29 I. A. 104, 6 C. W. N. 617 (622.)

(3) (1905) I. L. R. 28 All 72; 2 A. L. J. R. 749.

Messrs Jackson and Chowdhury and Mouli Syed Mahomed Tahir for the Petitioner.

Mr. O'Kinealy (Advocate General), Mr. S. Ahmed, and Moultis Shamsul Huda and Mahomed Muslafa Khan for the Opposite Party.

C. A. V.

The judgment of the Court was delivered by

Mookerjee J.—The order which we are called upon to revise in the present Rule was made by the Subordinate Judge of Patna under section 59 of the Bengal Land Registration Act of 1876. The circumstances under which the order in question was made are not in controversy before this Court and may be briefly outlined. One Nawab Sabdar Hossain Khan, a wealthy zemindar of Hasnabad in the District of Monghyr died on the 7th August 1905. He left considerable landed properties in the districts of Monghyr, Gya and Patna. The petitioner who alleges that she was the daughter of the maternal uncle of Sabdar Hossain was married to him, and the parties lived as husband and wife till the death of the former, upon the death of her husband she took possession of his estates, the bulk of which was situated in the districts of Monghyr and Gya. On the 15th November 1905, the present opposite party, Mussamat Kulsum, who claims to be the sister of the father of Sabdar Hossain, applied for registration of her name in the Collectorate in respect of the properties situated in the district of Patna, upon the allegation that as Sabdar Hossain was governed by the Shia Law, the petitioner, his childless widow, was not entitled to the estate, and that she as sister of the father of the deceased had succeeded to the properties by right of inheritance. On the 9th January 1906, the widow Omatul Mehdi preferred objection on the ground that she was entitled to the estate by right of inheritance as the daughter of the maternal uncle of Sabdar Hossain, and that in any event, she was entitled to retain possession of the properties till her dower, which was alleged to have been fixed at a sum of 5 lacs of Rupees and 25 gold mohurs, was satisfied out of the profits. The Deputy Collector heard the parties at considerable length, and on the 17th February 1906 made an order of reference to the Civil Court under section 55 of the Land Registration Act. The widow applied to the superior revenue authorities, but the Collector, the Commissioner and the Board of Revenue successively declined to interfere. The case was then taken up by the Subordinate Judge of Patna, and he held what is described as a

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summary enquiry into the question of the right to possession in respect of the interest in the estate in dispute, but which in substance is as full an investigation into the question of title and possession as can take place in a regular suit. The Subordinate Judge came to the conclusion upon the evidence that the widow was in possession of the properties by receipt of rent from the lessees, that she was not entitled to the estate by right of inheritance, that the dower debt claimed by her did not entitle her to take or keep possession of the properties, that the legal possession in the disputed properties must be taken to be in Mussamat Kulsum, and that consequently the objection of the widow must be disallowed and possession delivered to the rightful heiress. The widow now seeks to have this order discharged, and upon her application the Rule under consideration was issued. The learned counsel who appears in support of the Rule, has contended that the proceedings before the Subordinate Judge are vitiated by two defects, namely, *first*, that the Subordinate Judge had no jurisdiction to determine the matters in controversy as there was no valid reference to him by the Collector under section 55 of the Land Registration Act; and *secondly*, that the Subordinate Judge has acted illegally in the exercise of his jurisdiction, if he had any, and he ought to have held that not only the actual possession of the properties but also the right to retain possession of them till the satisfaction of the dower debt, was in the petitioner. It has been argued on the other hand by the learned Advocate General, *first*, that as the Subordinate Judge exercised a special statutory jurisdiction in aid and at the instance of the Revenue Courts, this Court has no jurisdiction to revise his orders, and *secondly*, that the Subordinate Judge was correct in his conclusion that the widow had no right to retain possession, temporary or otherwise, of the disputed properties in satisfaction of her claim for dower. To determine which of these contentions ought to prevail, it is necessary to refer for a moment to the leading provisions of the Land Registration Act applicable to the matter before us.

Section 42 provides that every person succeeding to the proprietary right in, or management of, estates shall apply to the Collector for registration of his name and the character and extent of his interest as such proprietor or manager. Section 48 provides for notice to possible objectors. Section 52 lays down the mode and scope of enquiry by the Collector. It provides that he has to ascertain the truth of the alleged possession of,

succession to or transfer of the estate or interest therein in respect of which registration is sought. Before the Collector can order the name of the applicant to be registered as proprietor of the estate or of any interest therein, he must satisfy himself that the possession exists or that the alleged succession or transfer has taken place and that the applicant has acquired possession in accordance with such succession or transfer but not otherwise. This clearly contemplates two different classes of cases. The determination of the question of possession alone is sufficient when the applicant claims to have assumed charge as joint proprietor on behalf of his co-sharers or as manager; in such a case, the Collector need satisfy himself only on the one point of the possession of the applicant. When, however, the applicant claims to be proprietor by succession or transfer, the Collector has to satisfy himself on two points, namely that the succession or transfer has taken place and that the applicant is in possession accordingly. In this latter case, therefore, the applicant can not succeed unless both the elements are established. If the succession or transfer is proved, but possession is found against the applicant, his name cannot be registered, or, conversely, if possession alone is proved, but the succession or transfer is not established, that is, if the possession proved is not attributable to the title set up, the application for registration must be refused. Section 55 next deals with cases of dispute as to possession, succession, or, acquisition by transfer. This section provides that if there is a dispute as to the possession, succession, or, acquisition by transfer, by the applicant, of the extent of interest in respect of which he has applied to be registered, the Collector must, in the first instance, try to satisfy himself, whether any person is in possession of the interest in dispute. If it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute, the Collector may adopt one of two courses. He may either himself determine summarily the right to possession, deliver possession accordingly, and make the necessary entry in the register, or, if, in his opinion, the dispute is of a character which is properly determinable by a Civil Court, he shall refer the matter in dispute to the principal Civil Court of the district, for determination. It is obvious, therefore, that the first duty of the Collector in the case of dispute is to determine whether any person is in possession of the disputed interest. If possession is found to be with any person, the Collector has no jurisdiction summarily to oust him. This is manifest from the

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alteration which was made in section 55 of the Land Registration Act by section 1 of Act V of 1878. Under section 55 as it stood in Act VII of 1876 in its unamended form, the Collector was entitled to determine summarily the right to possession, if the possession of the applicant in accordance with his application was not proved to his satisfaction. Under such a provision of the law, it might be open to the Collector to determine summarily the right to possession and deliver possession accordingly, so as to oust the third person. In the present amended form of section 55, however, the Collector is entitled to determine summarily the right to possession or make a reference to the Civil Court for the same purpose, only if no one is proved to be in possession of the interest in dispute. The essential pre-requisite for a reference to the Civil Court by the Collector is, therefore, an investigation by him into the question of possession and a conclusion that no body is proved to his satisfaction to be in possession. In the case before us, there was no such investigation by the Collector. The order of reference which he made shows, on the face of it, that he did not direct his attention to the question, whether any person was in possession of the interest in dispute. It follows, therefore, that the reference was irregular and in contravention of the provisions of section 55. We may add that section 58 lays down the procedure when a reference has to be made under section 55 and one of the heads upon which the collector has to furnish information to the Civil Court is, "the circumstances of the case, as far as they are before the Court and the reasons which have led him to make the reference." It is not enough for the Collector to repeat the language of section 55 and to say that in his opinion the dispute ought to be properly determined by a Civil Court. He must state that it is not proved to his satisfaction that any person is in possession of the interest in dispute.

Section 59 next defines the procedure before the Civil Court on receipt of reference. The Civil Court is to determine summarily the right to possession in respect of the interest in dispute, subject to a regular suit, and to deliver possession accordingly. Section 62 provides that the summary decision of the Court under section 59 shall have no other effect than that of settling the actual possession, but for such purposes it shall be final and not subject to any appeal or order for review.

Upon a review of these provisions of the Land Registration Act, the following conclusion appears to us to be reasonably plain.

When a person alleges that he has by succession, as in the present case, acquired an interest in an estate and is in possession of such interest, and on this basis, seeks registration of his name, if his claim is disputed by any other person who sets up a conflicting claim in respect of the same interest, the Collector must enter into the question of possession. If he finds that possession is with the applicant and that the title set up is also proved, he may enter his name in the register. If, however, it is not proved to his satisfaction that any person is in possession of the disputed interest, he may either determine summarily the right to possession and deliver possession accordingly, or he may make a reference to the Civil Court which may determine summarily the right to possession and deliver possession accordingly. The learned Advocate General contended that in section 55 the term 'possession' means 'lawful possession', in other words, that if the title of a person is established, the possession under section 55 must be assumed to be in him in the eye of law, even though the actual possession may be with some one else. He further contended that it is not merely open to the Collector, but it is his duty to determine, in every case, the right to possession and to place the rightful owner in possession, so as to oust the person who is actually in occupation. This contention, however, is contrary to the provisions of section 52 which, as we have stated already, show clearly that the Collector must not only satisfy himself that the alleged succession or transfer has taken place but also that the applicant has acquired possession in accordance with such succession or transfer. If, as is contended by the learned Advocate General, whenever it is found that A has succeeded to the estate of B or has obtained it by a transfer, it follows as a matter of law that A has acquired possession thereof, it would be wholly unnecessary for the Legislature to provide in section 52, as it has done, that the Collector must satisfy himself as to both the elements, namely, succession or transfer and the acquisition of possession in accordance with such succession or transfer. Section 52 shows plainly that unless both the elements are established, the Collector cannot order the name of the applicant to be registered. Reliance was, however, placed by the learned Advocate General upon the case of *Bushby v. Dixon* (1) in which it was ruled by the Court of King's Bench that where a freehold land in the occupation of a tenant for years, passes by

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descent, the heir is immediately seised in fact, and this is not altered by the occupier paying rent by mistake to another. Mr. Justice Bayley stated that where there is no one in possession at the death of the ancestor, there must be an actual entry by the heir to give him the seisin in fact; but when there is a tenant, his possession becomes that of the heir, "immediately on the death of the ancestor; the subsequent misconduct of the tenant in paying rent to another person or the mistake of the heir as to his right, cannot be to alter the nature of the seisin which he had before. This decision founded on the ancient learning of the seisin may be treated as good law, and was in fact relied upon by Lord Selborne in *Lyall v. Kennedy* (1) But it has no application to the present case. It may be conceded that under the Land Registration Act, a person who claims to have acquired an interest in an estate by succession or transfer and to be in possession by virtue of such title, is not entitled to be registered merely upon proof of possession. He must show that his possession is not wrongful and is attributable to the title which he sets up. But it does not follow, conversely, that, if he proves his title merely, but not his possession, he is entitled to have his name registered. As a wrong-doer in possession is not entitled to claim registration, so the rightful owner, if out of possession, is not entitled to claim registration merely on the ground that the legal possession is in him. To hold otherwise, would be to ignore the clear distinction between possession and right to possession, which is recognised in sections 52 and 55. In the case before us, it has been found that the petitioner, the widow, is in possession of the estate by receipt of rent from the lessees. It is not quite accurate to describe this as constructive possession. In the case of zemindaries where the proprietor can be in possession only by receipt of rent, he is in actual possession of his interest, if he is in receipt of rent. The zemindar's possession of the right to collect rent from the tenants in occupation is actual possession of a tangible property. (*Sarbananda Basu Mozumdar v. Pran Sanker Roy Chowdhuri*) (2), *Sarb Narain Singh v. Birj Mohun Thakur* (3) when a person has proprietary interest in land and as such is entitled to receive rent, he is in possession of his interest if he is in receipt of rent, while his tenant who is in actual occupation has possession which, in a sense, is the possession of the landlord or superior proprietor [see the observation of Lord Davey in

(1) (1890) 14 App. Cas. 437 (556), (2) (1888) 1 L. R. 15 Calc. 527.

(3) (1896) 1 L. R. 23 Calc. 80

Secretary of State for India v. Krishnamoni Gupta (1)]. If, therefore, a proprietor finds that the rent receivable by him is intercepted by some other person, he is dispossessed of his interest in the land. He loses possession, because the only mode of enjoyment by which that possession can be held, ceases to be available by the act of the trespasser. If this principle be applied to the facts found by the Subordinate Judge in this case, what is the position? There can be no possible controversy that the widow is in possession of the proprietary interest in the disputed properties. The question, therefore, arises whether her possession is lawful. It may be observed that she sets up what is *prima facie* a good title to possession. She alleges that she is entitled to a large sum of money as dower. According to her case, the amount is 5 lacs of Rupees and 25 gold mohurs. According to the finding of the Subordinate Judge, it is at least 41,000 Rs. and one gold mohur. Whatever the precise amount may be, as to which a determination is not necessary for our present purposes, she contends that she is entitled to remain in possession till the dower debt has been satisfied. There is a considerable body of high authority in support of this view. [See the decisions of their Lordships of the Judicial Committee in *Ameeroon Nissa and others v. Mooradoon Nissa* (2) and *Mussumat Bebee Bachun v. Sheikh Hamid* (3).] According to these cases, when a widow is in possession of the undistributed property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any portion of it is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession until her dower debt is paid. But she must account for all profits received by her, and she cannot, in her capacity as creditor, transfer, sell, or mortgage the property, so as to affect their shares. It may be conceded that there has been some divergence of judicial opinion upon this point, as is indicated by the decisions of the learned Judges of the Allahabad High Court in *Amanat-un-nissa v. Bashirun-nissa* (4) and *Mahammad Karimullah Khan v. Amani Begam* (5). There is no foundation, however, for any suggestion that the widow has taken possession of the estate by force or fraud. Her possession is *prima facie* lawful. If, therefore, she is in fact in

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(1) (1902) I. L. R. 29 Cal. 518, 6 C. W. N. 617 (622).

(2) (1855) 6 M. I. A. 211.

(3) (1871) 14 M. I. A. 377; 10 B. L. R. 45.

(4) (1894) I. L. R. 17 All. 77

(5) (1895) I. L. R. 17 All. 93.

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possession as found by the Subordinate Judge, if such possession was not obtained by force or fraud, if she came into possession peaceably, and if the possession can be attributed to a claim of title *prima facie* well-founded in law, it is not easy to perceive upon what ostensible ground it can be suggested that she is not in such possession of the property, as the Revenue Courts will recognise for purposes of registration. It could never have been intended that either the Revenue Courts or the Civil Court on a reference by the Revenue Court, should enter into a minute examination of the authorities upon a difficult question of Mahomedan Law, and while professing to decide summarily the right to possession, practically come to a decision upon the question of title, as elaborate and exhaustive as in a regular suit. We must consequently hold that the order of reference made by the Collector in this case was in itself irregular and that the Subordinate Judge upon the reference has exercised his jurisdiction illegally and with material irregularity. When he found upon the facts that the widow is in possession of the disputed property, as proprietor, by receipt of rent, that she is entitled to a large sum of money from the estate of her husband on account of her dower and that she peaceably entered into possession upon the death of her husband and claims to hold possession not as a wrong-doer but upon an assertion of title which is *prima facie* supported by judicial decisions of the highest authority, he ought not to have made an order the effect of which is to determine the question of title and to oust her from possession.

The only other point to which a reference is necessary is the question of the jurisdiction of this Court to revise the order of the Subordinate Judge. It was contended by the learned Advocate General that the order in question is made in the exercise of a special statutory jurisdiction and is consequently not an order in a "case" in which this Court can exercise its revisional powers under section 622 of the Code of Civil Procedure. In our opinion there is no foundation for this contention. No doubt, the Civil Court acquires jurisdiction by virtue of the reference made by the Revenue Court; but once the Civil Court has got seizin of the case, it exercises its powers as a Civil Court. It determines the question referred to it and delivers possession accordingly. It does not make a report to the Revenue Court to enable the latter to pass the final orders. Its decision must be taken to be the decision of an ordinary Civil Court, to which it

is competent for it to give effect. The mere fact that the exercise of its jurisdiction is initiated by a reference from the Revenue Court does not make the exercise of jurisdiction by it equivalent to an exercise of jurisdiction by the Revenue Court ; nor can we legitimately attribute to the proceedings before it the character of a proceeding before a Revenue Court. This is borne out by the provision of section 62 which expressly bars an appeal and a review. Such a restriction would not have been necessary, unless the order of the Civil Court was one which without such bar would be appealable or open to review under the provisions of the Code of Civil Procedure. In this view of the matter, this Court has clearly jurisdiction to interfere either under section 622 of the Code of Civil Procedure or under section 15 of the Charter Act. There can be no question, therefore, as to the competency of this Court to interfere, in the exercise of its revisional powers. It was suggested, however, that as the petitioner has her remedy by a regular suit, this Court ought not to interfere. No doubt, the ordinary rule is that where an aggrieved party has other remedy available, this Court is unwilling to interfere ; but it is unquestionable, that even if there be such remedy, this Court may interfere in exceptional cases [*Debi Das v. Ejaz Hossain* (1)], and upon the facts of the present case, we are satisfied that the exercise of our revisional powers is justified.

The result, therefore, is that this Rule must be made absolute ; the order of the Subordinate Judge will be discharged and the petitioner will be maintained in possession pending the decision of the question of title in controversy between the parties in a regular suit as contemplated by the Land Registration Act. We further direct the Subordinate Judge to certify accordingly to the Collector under section 63 of the Land Registration Act.

The petitioner is entitled to the costs of this Rule. We assess the hearing fee at 10 gold mohurs.

A. T. M. •

Rule made absolute.

(1) (1905) I. L. R. 28 All. 72.

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Before Mr. Justice Mitra and Mr. Justice Caspersz.

HARIHAR PERSHAD SINGH

v.

MATHURA LAL AND OTHERS.*

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1908.

March, 16, 27.

Civil Procedure Code (XIV of 1882) Sec. 461—Object—Withdrawal of money deposited, applications for—Joint Hindu family—Mitakshara school—Managing member, rights of—Joint brothers—Surety bond.

A managing member of a joint family, governed by the Mitakshara system of Hindu Law, who was appointed guardian *ad litem* of his minor brother for the purpose of a rent suit in which both the brothers obtained a decree for arrears of rent against their tenant, can withdraw the money deposited in Court by the tenant to the credit of himself and the minor, without obtaining leave of the Court under section 461 of the Code of Civil Procedure.

Per Mitra, J.—A managing member is the accredited agent of the family and can do all acts, beneficial to and necessary for the family. The introduction of the infant member of the family under the representation of the managing member as a next friend was merely formal, a matter of procedure, and was not necessary so far as the substantive rights were concerned.

Section 461 of the Code of Civil Procedure does not contemplate an execution of a bond for an indefinite amount or for the benefit of a co-parcener.

Per Caspersz, J.—The object of section 461 of the Code of Civil Procedure is to protect property received by guardians *ad litem* on behalf of the minors they represent. There is nothing in the words of the section from which any exception may be deduced.

The managing member of a Mitakshara family cannot sue without joining the other members as parties to the suit. There may be cases in which a manager alone can sue to recover rent for example, if he has given a lease in his own name, and the suit for rent due in terms of the lease.

Kattusheri Pishareth v. Vallotil Manakel (1) referred to.†

Joint brothers cannot be sureties, one of another, in a Mitakshara family. Hence the adult plaintiff cannot be called upon to furnish security in respect of money to be received by him on behalf of his minor brother who was made a co-plaintiff in order to obtain a joint decree for rent.

Application by the Plaintiff.

Application to withdraw money deposited in Court by the tenant.

The facts appear sufficiently from the judgment.

Babu Jogendra Chandra Ghose for the Petitioner.

No one for the Opposite party.

C. A. V.

* Civil Rule No. 2 of 1908, against the order of Babu Satkari Haldar, Munsiff of Arrah, District Shahabad, dated the 14th June 1907, passed in Suit No. 1032 of 1906 of that Court.

(1) (1881) 1 L. R. 3 Mad. 234.

† [See also *Mir Tapurak Hossain v. Gopi Narayan* (1907) 7 C. L. J. 251 at 280 and *Shamrathi Singh v. Kishan Prasad* (1907) 1 L. R. 29 All. 311—Rep.]

The judgments of the Court were as follows :

Mitra J.—Harihar Pershad Singh and Bhaskar Pershad Singh are brothers, members of a joint family governed by the Mitakshara system of Hindu law. Harihar Pershad is an adult and is the managing member ; Bhaskar Pershad is a minor. The brothers instituted a suit for rent against one of their tenants in the Court of the Munsiff at Arrah, Bhaskar Pershad being represented in the suit by his brother as next friend. They obtained a decree for rent and the tenant defendant deposited the amount of the decree in Court to their credit. Thereafter, they applied for the withdrawal of the amount, but the Munsiff declined to make an order for payment, on the ground that no order for payment could be made until the next friend of the minor plaintiff had complied with the provisions of section 461 of the Code of Civil Procedure by obtaining leave of the Court to receive the money and by filing a security bond for the protection of the minor's interest.

The order of the Munsiff was appealed from to the District Judge of Shahabad, but no appeal lay to him, and he referred the matter to this Court in its administrative capacity for direction in this case and in similar cases which are of constant occurrence. The Court, however, declined in its administrative capacity to determine the correctness or otherwise of a judicial order and to give any general directions.

The present application was made under section 622 of the Code for revision of the order of the Munsiff, and a rule was issued. No cause has been shown.

Harihar Pershad is the managing member of the joint family, and he represents it, and though, according to the rules of procedure in this Province, his minor brother is a necessary party in suits for rent, and was properly added as a co-plaintiff in the present suit, his absence from it as a party would not, according to the well-established principle of Hindu law regarding joint families detract from the right of the managing member, the accredited agent of the family, to do all acts beneficial to and necessary for the family including the withdrawal of money deposited in Court to its credit. The introduction of the infant member of the family under the representation of the managing member as a next friend was merely formal, a matter of procedure, and was not necessary so far as the substantive rights were concerned.

The legal constitution under Hindu law of a joint family

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governed by the Mitakshara system is such that a co-parcener has no defined share in the family property; the co-parceners are in the nature of a body corporate with joint rights, followed, on the death of a member, by survivorship. The interest of a co-parcener is not capable of definition, it being under a constant liability to variation on the birth of a new member or the death of an existing member. In the case of the birth of a male member, he acquires an interest at once by birth, and supposing money were deposited in Court to the credit of the family represented at the date of the decree in a suit by the then living members, the new member would at once acquire an interest in it, thus decreasing the definable shares of the other co-parceners. On the other hand, the death of a co-parcener increases the definable shares; such variation, however, is not due to legal representation in the sense that the words are ordinarily used, but owing to the rule of survivorship.

The fact that a minor member has no defined share, that it cannot be said at any time before partition what is the precise interest of a minor plaintiff in money deposited in Court when he has sued with the adult managing member, takes the case out of the purview of section 461. That section was not framed with an eye to the peculiar constitution of joint Hindu families. The minor plaintiff's share in the amount deposited in Court being undetermined, the bond would have to be, if any were, executed for an indefinite amount; but such a contingency, as also the execution of the bond itself for the benefit of a co-parcener, are opposed to the spirit and language of section 461. It would appear that in framing section 461, attention was not given to the peculiar constitution of joint Hindu families governed by the Mitakshara School.

In *Sham Kuar v. Mohanunda Sahay* (1), the Court held that a guardian under Act VIII of 1890 cannot be appointed of the property of a minor, who is a member of a joint Hindu family governed by the Mitakshara law and possessed of no separate estate, the reason of the decision being that the introduction of a guardian of a share which is unascertained and unspecified would tend to disorganize the family and bring about a separation without a partition. The foundations on which families governed by the Mitakshara system rest, as laid down in *Appovier v. Rama Subba Aiyar* (1), would be completely shaken, if the rules of

procedure and practice intended to apply to persons and their rights and liabilities of an altogether different character were made applicable to the co-parceners of such families. The same principle was applied in *Gharibullah v. Khalak Singh* (1), by the Judicial Committee of the Privy Council, to a mortgage executed by the *karta* of a joint family governed by the Mitakshara system of Hindu Law for himself and a minor co-parcener, notwithstanding that a guardian of the minor had been appointed by Court. The Privy Council ignored the status of the guardian appointed by Court and upheld a mortgage executed without the permission of the Court.

We, therefore, make the rule absolute, and set aside the order of the Munsiff and direct him to pass a payment order as asked for by the petitioners.

Caspersz J.—The question for our decision in this Rule is whether the managing member of a joint Hindu family, governed by the Mitakshara, who was appointed the guardian *ad litem* of his minor brother for the purpose of a rent suit in which both the brothers obtained a decree for arrears of rent against their tenant, is exempt from the restrictions imposed by section 461 of the Code of Civil Procedure

Section 461 (2) of the Code runs thus —“Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other movable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.”

The object of the section is to protect property received by guardians *ad litem* on behalf of the minors they represent. There is nothing in the words of the section from which any exception may be deduced. The language used is general and applicable to every case where property is received by a mere guardian *ad litem* on behalf of a minor. To read an exemption into the section must, therefore, be justified only by the clearest necessity.

Now, the facts upon which this Rule has to be decided are such as are contemplated by the section. The adult plaintiff, who was the manager of the joint family, was

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(1) (1908) L. R. 30 I. A. 165, 1 L. R. 25 All. 497.

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never appointed or declared to be the guardian of his minor brother's property under the Guardians and Wards Act, VIII of 1890. But he could not be so appointed because, as is now settled law, the interest of the minor co-plaintiff is not *individual* property at all. It may be said that, if the adult plaintiff represented the joint family, the addition of his minor brother as a co-plaintiff, was either unnecessary or intended to imply that the minor had some separate interest in the arrears of rent to recover which was the object of the suit. It is, however, too late to contend that, according to strict principles of Hindu law, the managing member of a Mitakshara family can sue without joining the other members as parties to the suit; see *Kattushevi v. Vallotil* (1). There may be cases in which a manager alone can sue to recover rent: for example, if he has given a lease in his own name, and the suit is for rent due in terms of the lease. This is not the case here, nor is there anything to indicate that the minor co-plaintiff is possessed of any separate property which might be the subject of proceedings under Act VIII of 1890.

On principle, also, joint brothers can not be sureties, one of another, in a Mitakshara family; therefore, the adult plaintiff cannot be called upon to furnish security in respect of money to be received by him on behalf of his minor brother who was made a co-plaintiff in order to obtain a joint decree for rent. The adult plaintiff represents the joint family, including the minor co-plaintiff. the decretal amount belongs just as much to the joint family as to the minor brother.

It is not necessary to consider the case of mortgage suits or other cases where minor plaintiffs are represented by guardians *ad litem* who are managing members under the Mitakshara system.

For these reasons, I agree that this Rule must be made absolute.

A. T. M.

Rule made absolute.

(1) ('84) I. L. R. 3 Mad. 234.

APPELLATE CIVIL.

Before Mr. Justice Doss.

HARI DAS BAIRAGI

v.

UDOY CHANDRA DAS AND OTHERS *

Occupancy holding, non-transferable, bequest of, if void or voidable—Void and voidable transaction, nature of—Recognition by landlord of transfer.

When a transfer of a non-transferable occupancy holding takes place, the transaction is in law voidable at the option of the landlord only. Hence the heir of an occupancy raiyat of such holding is bound by a bequest of the holding made by the latter in favour of a stranger.

If a transaction is void, no rights in favour of either party can grow under it, nor can it form the foundation of any estoppel. It is not necessary to have it set aside, its invalidity may be set up whenever it is sought to be enforced. It is incapable of being confirmed or ratified.

Mohori Bibee v. Dharmo Das Ghose (1) and *Beni Pershad Koeri v. Dudh Nath Roy* (2) referred to.

If a transaction is voidable, it is valid and binding upon the parties and persons deriving title through them, whether by descent, purchase or otherwise, until it is avoided.

The transfer of an occupancy holding which is not transferable by local custom, may be validated by the consent of the landlord.

Jagan Prasad v. Posun Sahoo (3), *Srimutty Sib Sundari Ghose v. Raj Mohun Guha* (4) and *Radhi Kishore Manikya v. Srimutty Ananda Praya* (5) referred to.

When the landlord recognises the transfer as valid, he recognises the transfer of the existing occupancy right as a valid transaction.

Appeal by the Defendant No. 1.

Suit to recover possession of a holding by the heir on the ground that the holding not being transferable by local custom or usage, the occupancy raiyat had no power to make a will in favour of the defendant No. 1.

The facts of the case appear sufficiently from the judgment.

Babu Sib Chandra Palit for the Appellant.

Babu Gobind Chandra Dey Roy, for the Respondents.

C. A. V.

* Appeal from Appellate Decree No. 662 of 1907, against the decree of A. H. Cunningham, Esq., Special Judge of Tipperah, dated the 3rd January 1907, affirming that of Babu homes Chunder Dutt, Settlement Officer of Tipperah, dated the 26th May 1906.

(1) (1902) J. L. R. 30 Calc. 539 ; L. R. 30 I. A. 114.

(2) (1899) I. L. R. 27 Calc. 156 ; L. R. 26 I. A. 216.

(3) (1903) 8 C. W. N. 212.

(4) (1903) 8 C. W. N. 214.

(5) (1903) 8 C. W. N. 235.

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The judgment was as follows :

The question which arises in this appeal is whether the heir of an occupancy raiyat, whose holding is not transferable by local custom or usage is bound by a bequest of the holding made by the latter in favour of a stranger. The facts which raised this question may be shortly stated. One Ram Das Bairagi was the owner of an occupancy holding which is not transferable by local custom or usage. He died leaving a will whereby he bequeathed the holding to defendant No. 1, who has subsequently obtained probate of the will and is now in possession of the holding. He left two daughters him surviving. The plaintiffs are the sons of one of the daughters; the other daughter has no son but has two daughters, and she is no party to the present suit. The plaintiffs sued to recover possession of the holding on the ground that the holding not being transferable by local custom or usage, the testator had no power to make a will in favour of defendant No. 1, and that therefore the plaintiffs are entitled to recover possession. The Courts below have accepted this contention as sound and have given the plaintiffs a decree for possession of the holding. Defendant No. 1 has appealed, and it has been contended on his behalf that the heirs are bound by the bequest of the holding by the testator in his favour.

Now, it seems to me that the proper mode of approaching towards a solution of this question is to determine whether when a transfer of a non-transferable occupancy holding takes place, the transaction is in law *void* or *voidable*; and, if voidable, at whose option. It is almost elementary that if a transaction is void, no rights in favour of either party can grow under it, nor can it form the foundation of any estoppel (see *Mohori Bibi v. Dharmodas Ghose*) (1). It is not necessary to have it set aside; its invalidity may be set up whenever it is sought to be enforced. It is incapable of being confirmed or ratified. (See *Beni Fershad Koeri v. Dudh Nath Roy*) (2). If, however, the transaction is voidable, it is valid and binding upon the parties and persons deriving title through them, whether by descent, purchase, or otherwise, until it is avoided. It is perfectly clear upon the authorities that the transfer of an occupancy holding which is not transferable by local custom or usage may be validated by consent of the landlord. [See *Radha Kishore Manikya v.*

(1) (1902) I. L. R. 30 Calc. 539.

(2) (1899) L. R. 26 I. A. 216; I. L. R. 27 Calc. 156.

Sreemutty Ananda Priya (1), *Jogun Proshad v. Posun Sahoo* (2), *Sreemutty Sibo Sundary Ghose v. Raj Mohun Guho* (3)]. I am not unmindful of the possible suggestion that such consent on the part of the landlord may be regarded as a new settlement in favour of a transferee. But it seems to me that the answer to it is that the supposed new settlement would not vest in the transferee any right of occupancy. It would be the creation of a holding for the first time. Therefore, when the landlord recognises the transfer as valid, he recognises the transfer of the existing occupancy right as a valid transaction. If it had been a transaction absolutely void as being opposed to law, no amount of consent on the part of the landlord could have validated it. It follows, therefore, from these premises that the transfer of an occupancy holding which is not transferable by local custom or usage is not a void transaction, and its invalidity cannot be set up by the occupancy raiyat or any person claiming title through him. The transfer then is only voidable, and that at the instance of the landlord only, the usual grounds upon which a voidable contract between persons competent to contract may be avoided being out of the question in such a case. A careful examination of the cases of *Bhagirath Changa v. Sheikh Hafizuddin* (4), *Basarat Mandal v. Sabulla Mandal* (5), *Ambica Nath Acharjee v. Aditya Nath Motra* (6) and *Ayenuddin Nasya v. Srisht Chandra Banerjee* (7), will show that this, in fact, is the principle which underlies them. In *Bhagirath Changa v. Sheikh Hafizuddin* (4), purchasers of portions of an occupancy holding not transferable by local custom or usage sued the transferor of the occupancy right for possession of the holding, and, it was held that the latter was estopped from setting up the invalidity of the transfer by him, and the purchasers were held entitled to recover possession of the holding. Similarly in the case of *Basarat Mandal v. Sabulla Mandal* (5), purchasers of a non-transferable occupancy holding sued to recover possession of the holding from persons who were in possession apparently without any title: the defendants resisted the action on the ground that the holding being not transferable, the plaintiffs had no valid title to the holding and were not entitled to recover possession: it was held that the question of non-transferability

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(1) (1903) 8 C. W. N. 235.

(4) (1900) 4 C. W. N. 679.

(2) (1903) 8 C. W. N. 172.

(5) (1898) 2 C. W. N. colxxix.

(3) (1903) 8 C. W. N. 214.

(6) (1902) 6 C. W. N. 624.

(7) (1906) 11 C. W. N. 78.

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was one which could not be legitimately raised by the defendants who were trespassers and that the plaintiff had a right to be protected in the enjoyment of his purchase against all the world except possibly his landlord. In *Ambica Nath Acharjee v. Aditya Nath Moitra* (1), the question was, who, as between two successive transferees of an occupancy holding not transferable by local custom or usage, was entitled to the surplus proceeds of the sale of the holding, after satisfaction of a decree for rent obtained by the landlord; and, it was held that the earlier transferee was so entitled. There Maclean C. J., observed "The landlord is not a party to this suit; he is raising no question about the transferability of the jote: it does not matter to him which of the two claimants gets the money. He has been paid all that is due to him. Under these circumstances, I do not see how the question of transferability can properly arise. In all the cases cited, the question was between the landlord and tenant." It is, therefore, clear that in the opinion of the learned Chief Justice the question of non-transferability could not be raised by any person other than the landlord in other words, it may be raised between the landlord and the tenant and not between the tenant and his transferee. In *Ayenuddin Nasya v. Srish Chandra Banerjee* (2), the question of non-transferability was raised between two rival purchasers of an occupancy-holding, one being a purchaser of the holding at a sale in execution of a mortgage decree in his own favour, the other being a purchaser at a sale in execution of a decree for rent obtained by a co-sharer landlord; the purchase of the latter was subsequent to the purchase of the former. It was held that the question of the non-transferability of the holding could not be raised between such parties, and that the subsequent purchaser took the holding subject to the rights acquired by the purchaser at a sale in execution of the mortgage-decree.

These cases clearly illustrate the general principle which I have already indicated, that the transfer of an occupancy holding is not a void transaction, that it is binding between the parties, namely, the transferor and the transferee and all persons claiming through them, and that it is voidable only at the option of the landlord. If, then, such is the character of the transaction, it seems to follow that the heir of an occupancy raiyat ought to be held bound by a transfer of the holding made by a will. If he is bound

(1) (1902) 6 C. W. N. 624.

(2) (1906) 11 C. W. N. 76.

by a transfer for a valuable consideration or by a gift, there does not seem to me to be any reason why he ought not to be held bound by a transfer made by a will.

A further question was raised by the learned Vakeel for the appellant that as one of the two daughters of Ram Das Bairagi is still alive, the plaintiffs are not his heirs and are therefore not entitled to sue. The first Court held that as she has no male issue but only daughters and has no prospect of getting a son, meaning apparently that she is past child-bearing, she was not entitled to succeed. The lower appellate Court has not come to any finding as to whether the other daughter is entitled to succeed or not, but has proceeded on the assumption that she was, and has held that she may, if she chooses, enforce her right by a separate suit. I think the view of the lower appellate Court upon this point is not right. If the other daughter is not past child-bearing, under the Hindu Law she is the sole heiress, and the plaintiffs are not entitled to succeed as heirs. Therefore, if the lower appellate Court came to a finding upon the point adverse to the plaintiffs, the plaintiffs' suit would fail upon that ground alone: and, if my opinion upon the first point had been in favour of the plaintiffs, it would have been necessary for me to remand the case to the lower appellate Court for a finding upon the question as to whether the other daughter was past child-bearing or not, and whether she was or was not on account of that reason disqualified from inheriting.

For these reasons, I am of opinion that the plaintiffs' suit ought to fail and that this appeal ought to be decreed with costs.

A. T. M.

Appeal decreed. suit dismissed.

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Before Mr. Justice Mookerjee and Mr. Justice Holmwood.

BIKU HALWAI AND OTHERS

v.

MOHESH HALWAI, MINOR BY HIS FATHER AND GUARDIAN
GUR CHURN HALWAI AND OTHERS.*

CIVIL.

1907.

April, 29, 30
May, 15.

Civil Procedure Code (Act XIV of 1882) Sec. 462—Court's duty in granting leave—Compromise—Certificated guardian if to take permission of Judge—Guardian and Wards Act (VIII of 1890) Sec. 29—Review—Suit to set aside decree, if maintainable—Fraud—Valuation—Jurisdiction.

A compromise of a suit is not one of the acts contemplated in section 29 of the Guardian and Wards Act; hence a certificated guardian can compromise a suit without obtaining the sanction of the District Judge. The statutory provision for safe-guarding the interests of minors in suits is contained in section 462 of the Code of Civil Procedure.

The Court in sanctioning a compromise on behalf of an infant under section 462 of the Code of Civil Procedure, should record the fact that the application was made to it by the next friend or guardian, that the terms of the compromise were considered by it, and should in terms state that the question whether the compromise was for the benefit of the infant was considered. From the mere fact that the Court passed the decree in accordance with the compromise, it can not be inferred that any of those steps preliminary and necessary to the making of the decree had been taken by the Court.

Ram Churn Raha Bakshee v. Mungul Sircar (1), *Kalavati v. Chedi Lal* (2), *Virupakshappa v. Shidappa* (3), *Lala Majlis Sahai v. Musst. Narain Bibi* (4) and *Govindasami Naidu v. Alagirisami Naidu* (5) followed †

Where a decree is passed on adjudication, no separate suit lies to set aside the decree except on the ground of fraud, but where it is passed simply upon a compromise, a suit lies upon grounds other than that of fraud.

Surendra Nath Ghosh v. Hemangini Das (6) followed. ‡

Where the minors were defendants represented by their mother and guardian, in the original suit as also in the review petition, and the application for review was discharged with the express direction that the applicant's proper remedy was by way of suit and not by way of review, a suit by the minors through a new next friend, their mother and former guardian *ad-litem* being impleaded as a defendant, lies to set aside the decree on grounds other than that of fraud.

* Appeal from Appellate Decree No. 972 of 1905 against the decree of C. E. Pittar Esq., District Judge of Gaya, dated 31st March 1905, affirming that of Babu Upendra Nath Bose, Subordinate Judge 1st Court, Gaya, dated 31st March 1904.

(1) (1871) 16 W. R. 232.

(3) (1901) 1. L. R. 26 Bom. 109.

(2) (1895) 1. L. R. 17 All. 531.

(4) (1902) 7 C. W. N. 90.

(5) (1905) 1. L. R. 29 Mad. 104.

† [As regards Court's duty *See also Barhamdeo Prasad v. Banarsi Prasad* (1901) 3 C. L. J. 119 (120). As regards express order, a contrary decision was passed in *Midnapore Zemindari Co. Ltd. v. Gobinda Mukto* (1907) 8 C. L. J. 81—Rep.]

(6) (1906) 1. L. R. 34 Calo. 83.

‡ [See also *Barhamdeo Prasad v. Banarsi Prasad* (1901) 3 C. L. J. 119—Rep.]

Ram Gopal Mojumdar v. Prasanna Kumar Samad (1) distinguished.

Where the plaintiffs valued their claim in the Munsiff's Court at Rs. 500, and issue was taken on the point, (which if decided in favour of the defendant would have ousted the Munsiff's jurisdiction), but no evidence was adduced there was no waiver of jurisdiction and the High Court can interfere on second appeal.

Gorinda Menon v. Karunakara Menon (2) distinguished.

Appeal by the Plaintiffs.

Suit to have it declared that a decree passed in a former suit upon compromise was invalid.

The facts of the case and argument appear sufficiently from the judgment.

Babus Joges Chunder Roy and Surendra Nath Ghosal for the Appellants.

Babus Umakali Mukerji, Harendra Narayan Mitter and Biraj Mohun Mojumdar for the Respondents.

C. A. V.

This judgment of the Court was delivered by

May, 15,

Holmwood J.—The facts out of which this appeal arises are briefly as follows :—There was a house in Gaya worth Rs. 4,000 that belonged originally to one Lashman Halwai, who was succeeded by his son Punwa, who in his turn died childless, leaving his mother Ram Dulari to succeed him. This Ram Dulari took as a second husband one Chotu Halwai father of the four plaintiffs, and on the 9th December 1899, before marriage, executed a conveyance to him of this house which she had greatly improved at her own expense. The dispute as to the value of the house probably arose from this fact.

The value of Rs. 500 now given by the defendants was apparently its value when it was a one-storied house partly *kutchha* and partly *pucca*. Ram Dulari made it wholly *pucca* and added a second story to it, and its value is now stated to be Rs. 4,000 and this is borne out by the finding of fact in the Sub-Judge's judgment that its present value at 20 years purchase on the monthly hire of all the rooms would be Rs. 5,040.

The Sub-Judge did not, however, accept this valuation, and we are unable to appreciate his final finding on the point. He says "This was not the market value of the house. It could not be. The market value of the house has not been proved to be over Rs. 2,000."

One Mahesh Halwai, son of a sister of Punwa Halwai, sued as a minor represented by his father Gur Charan Halwai in the

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Court of the first Munsiff of Gaya in 1901 to recover the house as the nearest *bandhu* of Punwa Halwai against the four minor plaintiffs, sons of Chotu Halwai, through their mother and guardian Musst. Jasoda Koer, alleging the value of the house to be Rs. 500. The 1st Munsiff of Gaya had special powers to try suits up to the value of Rs. 2,000. On the 5th June 1902, a petition of compromise was filed by a Pleader purporting to act on behalf of Musst. Jasoda Koer and ostensibly signed by one Basant Halwai, son-in-law and agent of Musst. Jasoda Koer, by which she gave up all claim to the house on behalf of the minors on consideration of being let off the costs of the suit amounting to some Rs. 70.

The minors, who are now plaintiffs in this suit, sue through another next friend Kishan Halwai to have it declared that the decree of the 6th June 1902 passed in the suit No. 25 of 1901 by the Court of the 1st Munsiff of Gaya was obtained by fraud of defendant No. 1 Mohesh Halwai against the plaintiffs, that the petition of compromise was not filed with the knowledge and consent of Musst. Jasoda Koer, and that even if it was, she had no authority to file it, in as much as she had not as certificated guardian obtained the sanction of the District Judge, and also that the permission of the Munsiff was not obtained in due course of law and was not according to law.

Both the lower Courts have found against the plaintiffs and dismissed the suit. At the hearing, a further point which affected the validity of the decree was taken, namely that the house being worth Rs. 4,000, the Munsiff had no jurisdiction to entertain the suit.

The findings of the lower appellate Court practically amount to this. That there is no doubt that Jasoda Koer did have the compromise filed through her agent Basant Lal. That she was justified in so doing, in as much as the case of the minors was a weak one and they were saved heavy costs. That the bare permission of the Munsiff is all that the law requires to bind minors to a compromise filed in Court, and that the question of jurisdiction was raised before the Munsiff and no evidence was offered to show that the property was worth more than Rs. 500. The question, therefore, cannot now be reopened.

The point as to the necessity for the sanction of the District Judge which had been found unnecessary by the Court of first instance does not seem to have been pressed in the lower appellate Court, and there is no finding on it. It was faintly suggested to us again in this appeal, but it was conceded and is sufficiently

obvious that the compromise of a suit is not one of the acts contemplated in section 29 of the Guardian and Wards Act, and the statutory provision for safe-guarding the interests of minors in suits is contained in section 462 of the Civil Procedure Code.

As regards the other points, there can be no doubt that the findings of the lower Courts are conclusive as to the filing of the compromise by Jasoda Koer, and this point cannot be re-opened in second appeal. The finding as to her being justified by the circumstances is however hardly adequate. The question being whether as a fact the compromise was for the benefit of the minors, the issue should have been decided clearly. When minors claim a right to a house worth Rs. 4,000 and deny the jurisdiction of the Court to try the question, and the case is then compromised and not gone into on the merits, it is not enough to say that they apparently had a very weak case and were saved Rs. 70 in costs. On the point of jurisdiction, as we shall presently see, they had a very strong case, and had the then plaintiffs' suit been dismissed on that ground, they would have got their costs, and it might very well be that the then plaintiffs would not have been prepared to pursue their claim in a court of superior jurisdiction on a valuation of Rs. 4,000. Moreover, the contesting plaintiff was himself a minor, and the Court does not appear to have given him any permission to enter into a compromise nor considered for one moment whether it was for his benefit. This brings us to the consideration of the question which is the principal point of law in this case, what are the duties of a Court in granting leave under section 462 of the Code of Civil Procedure,

In *Ram Charan Raha Buxhee v Mungul Sugar* * (1) Norman C. J., remarked: "It is a rule adopted by Courts of Equity in England and in the Original Side of this Court, a rule which has been acted upon on many occasions within my own knowledge on this (*i.e.*, the Appellate) Side of the Court, that where infants are concerned, the Court will not make a decree against an infant without ascertaining that it is for the benefit of the infant that such a decree should be pronounced, and we think that this is only a proper protection to the infant, because if the decree is once pronounced it becomes binding upon the infant, and he is not competent to dispute it unless he can show that the decree was obtained by fraud. This would throw the burden of proof on the infant and would place

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many difficulties in his way." He goes on to say "the Subordinate Judge has only done his duty" (in making proper enquiry, &c.)

The duty of Courts to make enquiry before giving leave was therefore a clearly established rule in the year 1871, and it has received the stamp of judicial approval in numerous cases in all the Courts in India since then. In the case of *Kalavati v. Chedi Lall* (1), the rule was very clearly laid down, not, as the learned Judge in the Court below holds, as a counsel of perfection, but as a necessary preliminary to an order under section 462. "In order to make an agreement or compromise to which section 462 applies a lawful agreement or compromise, it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise... Further the Court should record the fact that such application was made to it, that the terms...were considered by the Court and that having regard to the interests of the minor, the Court granted leave... From the mere fact that the Court passed the decree in accordance with the compromise, it cannot be inferred that any of these steps preliminary and necessary to the making of the decree had been taken by the Court."

The same view has been taken by the Bombay Court in the case of *Virupakshappa v. Shedappa* (2), where it was held that it must be shown that the Court had before it the necessary materials to enable it to arrive at a judicial conclusion as to the propriety and reasonableness of the compromise.

In a recent case in Madras, *Gowndasami Naidu v. Allagirisami Naidu* (3), it is pointed out that in sanctioning a compromise on behalf of an infant, the order granting the sanction should in terms state that the question whether the compromise was for the benefit of the infant was considered, and the learned Judges referred to the case of *In re Birchall Wilson v. Birchall* (4), where Jessel M. R. stated that the practice he followed and that followed by Lord Romilly before him at the Rolls, had been to require not only that the compromise should be assented to by the next friend or guardian of the infant, but that his solicitor should make an affidavit that he believes the compromise to be beneficial to the minor and that his counsel should give an opinion that he considers it to be so. The view that the leave of the Court must be express and must be arrived at upon the

(1) (1895) I. L. R. 17 All. 531.
(2) (1901) I. L. R. 26 Bom. 109.

(3) (1905) I. L. R. 29 Mad. 104.
(4) (1880) L. R. 16 Ch D 41.

exercise of a judicial discretion as to the propriety of the compromise in the interests of the minor, has been affirmed by this Court in *Lala Maylis Sahai v. Mussamat Narain Bibi* (1), relying on the Allahabad case above cited and on the case of *Sharat Chunder Ghose v. Kartik Chunder Mitter* (2), and the necessity of a proper enquiry and a judicial decision thereon, is now well established.

But it is urged for the respondents that no fraud having been found, the decree cannot be set aside, and in support of this contention the ruling in *Surendra Nath Ghose v. Hemangini Dassi* (3), has been cited to us; but the decision in that case is directly against the respondents and is clear authority for the proposition that when a decree is passed on adjudication, no separate suit would lie to set aside the decree except on the ground of fraud, but where the decree is passed simply upon a compromise, a suit would lie to set aside the decree upon grounds other than that of fraud.

It is further urged that there having been an application to the Munsiff for a review, the decree cannot be challenged by a suit, and the ruling in *Ram Gopal Majumdar v. Prasanna Kumar Samad* (4) is relied on. That case is clearly distinguishable from the present. There the plaintiffs being *sui juris* impugned the authority of their pleader to enter into a compromise on their behalf. It was found on review on the merits that he had such authority, and it was held that the matter became *res judicata*, the parties to the subsequent suit to set aside the decree being the same.

Here the minors were defendants in the original suit. They were represented by their mother and guardian in the suit and also in the review, and the application for review was discharged with the express direction that the applicants' proper remedy was by way of suit and not by way of review. The suit now brought is by the minors through a new next friend, and their mother and former next friend is impleaded as a defendant. There can be no doubt that the suit will lie, and that the decree may be set aside on grounds other than that of fraud.

Finally we come to the question of jurisdiction. It is urged that plaintiffs valued their claim in the Munsiff's Court at Rs. 500. Issue was taken on the point, but no evidence was adduced. But there can be no waiver of jurisdiction in a case like this. If

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(1) (1902) 7 C. W. N. 90.

(2) (1883) 1. L. R. 9 Calc. 810.

(3) (1906) 1. L. R. 34 Calc. 83.

(4) (1905) 2 C. L. J. 508.

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the property was worth more than Rs. 2,000, the Court had no inherent jurisdiction to try the case and the decree passed by it would be void. If it was void at the time it was passed, it is void still. It is true that it has been held that the Courts will not interfere on second appeal, unless it was shown that the disposal of the suit had thereby been materially prejudiced ; see *Govinda Menon v. Karunakara Menon* (1) ; but this depends on the rule in *Ledgard v. Bull* (2) that if the parties join issue and go to trial on merits, it may result that having themselves constituted the Court their arbiter, the parties may be bound by its decision. In this case, the objection to jurisdiction was taken at the earliest opportunity, to wit, in the written statement, and the parties did not submit the merits of the case to the arbitrament of the Court. If therefore the value of the house was beyond the pecuniary jurisdiction of the Munsiff, the present plaintiffs are entitled to have the decree of the Munsiff dated 6th June 1902, set aside.

But there is no clear finding of the lower Courts as regards the three matters of fact on which the questions of law we have just been discussing depend.

These are : Whether as a matter of fact the matter was explained to the Munsiff and he was satisfied that the compromise was for the benefit of the minors ?

2. Whether as a fact the compromise was beneficial to both sets of minors ?

3. Whether as a fact the house at the time of the suit was worth more than Rs. 4,000.

We sent for the original records of the suit in the Munsiff's Court and of the proceedings in review, and we find that there is not a trace in either that the Munsiff applied his mind to the merits of the compromise. There is nothing beyond what appears on the order sheet printed in the paperbook. Only one petition is filed, and on that is endorsed the signature of the lady's agent with an endorsement by the plaintiff's pleader "my client agrees to the terms of the compromise." This is, however, a question to be determined as one of fact by the lower appellate Court.

We remand the case to the lower appellate Court for a finding on these three points with reference to the remarks we have made in our judgment.

The records will be returned to this Court with the learned

(1) (1900) I L. R. 24 Mad. 43.

(2) (1886) I. L. R. 9 All. 191 ; L. R. 13 I A 134.

Judge's findings thereon within one month of their reaching the lower Court. The case will remain on the file of this Court for final decision.

The question of costs will be reserved till the final disposal of the case.

After this remand, the case again came up for hearing before Mookerjee and Holmwood JJ. on 14th January 1908, when their Lordships again remanded the case to the lower Court for taking further evidence, including the evidence of the Munsiff.

After this second remand, the case came up for hearing before Mitra and Bell JJ. when their Lordships allowed the appeal and delivered the following judgment.

Mitra J.—On the findings of fact arrived at by the lower appellate Court, there can be only one conclusion, namely, that the compromise decree in Suit No. 176 of 1901 of the Munsiff's Court at Gaya was not binding on the minor plaintiffs, the then defendants. The Court of the Munsiff at Gaya had no jurisdiction to entertain the suit. The decree, therefore, in suit No. 176 of 1901, wherein Mohesh Halwai was the plaintiff and Biku Halwai and others were the defendants, must be set aside, and we order accordingly. We further direct that, as the Munsiff had no jurisdiction to entertain the suit (No 176 of 1901) he should return the plaint for presentation in the proper Court, namely, the Court of the Subordinate Judge of Gaya. Our order should be transmitted to the lower Court *at once*, and the Munsiff should direct the pleader for the plaintiff Mohesh Halwai to receive the plaint and present it *at once* in the Court of the Subordinate Judge.

As we have no doubt, on the facts, that the plaintiffs had been prosecuting the suit in the Munsiff's Court, having been fully under the impression that, that Court had jurisdiction to entertain the suit, we direct that each party do bear his and their own costs in the suit under appeal, namely, suit No. 117 of 1903.

A. T. M.

Appeal allowed.

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July, 16, 1908.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

KRISHNA PERSHAD ROY

v.

ROMES CHUNDER MANDOL AND OTHERS.*

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1908.

August, 4, 11.

Primogeniture—Restriction on alienation—Civil Procedure Code (Act XIV of 1882) Sec. 462—Leave of Court, if to be express—Presumption—Compromise decree when to be set aside.

Where there is a custom of primogeniture, there is no restriction on alienation by the incumbent for the time being, unless a special custom is proved to the contrary.

(*Pittapur case*) *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards* (1) followed.

In order that a compromise may be binding upon a minor, the leave of the Court must be express, and further it must be arrived at upon the exercise of judicial discretion as to the propriety of the compromise in the interests of the minor.

Ram Churn Raha Buxhee v. Mungul Sircar (2), *Sharat Chunder Ghose v. Kartik Chunder Mitter* (3), *Lala Maylis Sahai v. Musst. Narain Bibi* (4) and *Biku Halwai v. Mahesh Halwai* (5) followed.

Virupakshappa v. Shidappa (6), *Kalavati v. Chedi Lal* (7) and *Govindasami Naidu v. Alagirisami Naidu* (8) referred to.

Where a decree was passed without any judicial enquiry or finding as to whether the compromise was for the benefit of the minor, although a formal order of sanction to file the compromise petition was given to an Official of the Court who acted as the minor's guardian *ad litem*

Held, that the decree was inoperative.

When the Court permits a compromise, it must be presumed in the absence of evidence to the contrary that it gave due consideration to the matter.

Midnapore Zemindari Co. Ltd. v. Gobinda Mahto (9) referred to and considered.

Although in appeal a decree made upon a compromise in a suit in which a minor was a party would be held to be invalid as against a minor, it could not after it had become final and been acted upon, be set aside, unless it were shown to be prejudicial to the minor

Aman Singh v. Narain Singh (10) followed †

Appeals by the minor Plaintiff in two suits.

Suits for declarations that neither the plaintiff nor his ancestral properties were bound by two decrees passed against his father and himself.

* Appeals from Original Decrees Nos 471 and 504 of 1907 against the decrees of Labu Jogendra Nath Mukerji, Subordinate Judge of Cuttack, dated 19th September 1907.

(1) (1898) I. L. R. 22 Mad. 383, L. R. 26 I. A. 83.

(2) (1871) 16 W. R. 232.

(3) (1883) I. L. R. 9 Calc. 810.

(4) (1902) 17 C. W. N. 90.

(5) (1907) 8 C. L. J. 268.

(6) (1901) I. L. R. 26 Bom. 109.

(7) (1895) I. L. R. 17 All 531.

(8) (1905) I. L. R. 29 Mad. 104.

(9) (1907) 8 C. L. J. 31.

(10) (1897) I. L. R. 20 All. 98.

† [But see *Barhamdeo Prasad v. Banarsi Prasad* (1901) 3 C. L. J. 119

The facts of the case and the argument appear sufficiently from the judgment.

Moulvi Syed Shamsul Huda (for Babu Mahendra Nath Roy) and Babu Monmota Nath Mukerjee for the Appellant.

Babus Nalini Ranjan Chatterjee and Nagendra Nath Ghose for the Respondents.

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Krishna Pershad Roy

v.
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Mandal.

C. A. V.

The judgment of the Court was as follows:—

August, 11.

These appeals are by the minor plaintiff in two suits which he brought, through his mother and guardian, for a declaration that neither he nor his ancestral properties were bound by two decrees passed against his father and himself on the 30th June 1904 on the basis of a compromise, which, he alleges, was collusive and fraudulent and was inoperative as against him, he being a minor at the time, and the decrees having been passed without any judicial enquiry or finding as to whether the compromise was for his benefit, although a formal order of sanction to file the compromise petitions was given to an Official of the Court who acted as his guardian *ad litem*.

It appears that the grand-father of the plaintiff, one Hara Prasad Roy, executed a mortgage bond charging the ancestral properties with a debt, for the discharge of certain previous debts secured by decrees under which the mortgaged property was liable to sale. This was on the 30th May 1890, before the plaintiff's birth, and was for Rs. 5200.

On the 10th September 1890, the said Hara Prasad Roy and the plaintiff's father Ram Prasad Roy gave a mortgage of the ancestral property for a sum of Rs. 18,500. Upon these two mortgages, the defendants brought two suits Nos. 35 and 36 of 1903 against the plaintiff and his father.

In suit No. 35 the father of the plaintiff, who had neglected to look after his son's case and finally refused to represent him as guardian *ad litem*, filed a *rajanama* on the 24th June 1904 admitting the claim. The Nazir of the District Judge's Court, Babu Annada Chandra Das, who had been appointed guardian *ad litem* for the plaintiff upon his father's repudiation of the guardianship, applied for and obtained leave to file a petition in Court that the suit be decreed as claimed.

In suit No. 36 was filed a petition to be allowed to enter into a compromise on behalf of the minor and he obtained leave to do so.

By this compromise a sum of Rs. 28,000 due for interest on both mortgages was remitted.

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Suit No. 35 was decreed according to confession of judgment against defendants 1 and 2, that is the father of the plaintiff and the plaintiff himself, but the only order made was against the mortgaged properties. This was nearly Rs. 15,000. Suit No. 36 was decreed for Rs. 66,770 against the mortgaged properties, and it was also declared that if the whole decretal amount was not paid off by the sale of the mortgaged properties, the remainder will be realised by the sale of the other properties of the defendants 1 to 12.

In both decrees, it was clearly set out that under the custom obtaining in the family of the defendants 1 to 12, that is, under their family usage, the eldest son is the malik and entitled to all the zemindari etc. properties.

This custom is admittedly common ground on the pleadings of both parties in these appeals, but the plaintiff maintains that there is a further custom of inalienability of the ancestral property, while the defendants maintain that in the absence of any evidence of such further custom, the principle of law laid down by the Judicial Committee in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards and Venkata Kumari Mahipati Surya Rao* (1), viz, that where there is a custom of primogeniture, there is no restriction on alienation by the incumbent for the time being, unless a special custom is proved to the contrary, must prevail. Upon this point, therefore, we must at once find against the plaintiff's contention, and hold that neither at the time of the mortgages nor at the time of the decrees, had he any right or interest in respect of the mortgaged properties so as to be able to avoid their sale in execution of a mortgage decree obtained against the then incumbent. This would be enough to conclude his case in both these appeals, were it not for the fact, that in suit No. 35 it is still possible that proceedings under section 90 may be taken against him, and that in suit No. 36 a personal decree has been passed against him.

It is necessary, therefore, owing to these outstanding claims against him, to consider the point of law on which alone these appeals are based viz. that the attention of the Court in suits Nos. 35 and 36 was not drawn to the terms of the compromise and that no judicial finding was come to, whether the compromise was for his benefit or prejudicial to his interests.

The Subordinate Judge in the Court below has altogether dismissed plaintiff's suits on the ground that he has failed to

show that he was not benefited by the compromise decree. This is in our opinion not sufficient. It is perfectly clear from the Nazir's evidence and from the decrees that the question of the benefit to the minor was not adequately considered either by his guardian or by the Court. The guardian says he knew Ram Prasad Roy, the plaintiff's father, was a drunkard and yet he did not make any enquiry when the plaintiff's father and the pleader assured him that the plaintiff was benefited by the *solennamas*. The Court did not ask him anything regarding them. A pleader for the creditors told him that the plaintiff was getting a large remission and on his assurance he signed the petition.

Two illegalities in the decree are shown to the prejudice of the minor; one is, that interest at 12 per cent. has been allowed up to the date of realisation, the other is, that certain debutter properties which the plaintiff's father and grand-father had no power to mortgage were included in the decree, and the plaintiff has succeeded in a third suit tried along with the two now before us in getting this *debutter* released from the decree and no appeal has been preferred against this relief.

The only order in suit No. 35 regarding the sanction necessary under Sec. 402, Civil Procedure Code, is as follows—"Babu Ananda Chandra Dass is permitted to file petition admitting the plaintiff's claim on behalf of minor defendant No. 2," and in suit No. 36 "on application Ananda Chandra Das is permitted to file *solehnama* on behalf of the minor defendant No. 2." Now it has been laid down in a long series of rulings of this Court commencing with *Ram Churn Raha Bukshee v. Mungul Sugar* (1) and the case of *Sharat Chunder Ghose v. Kartik Chunder Mitter* (2) and ending with the case of *Biku Halwai v. Mahesh Halwai* (3) to which one of us was a party, following the case of *Lala Majlis Sahai v. Musst. Narain Bibi* (4), that in order that a compromise may be binding upon a minor the leave of the Court must be express, and further in the later cases, that it must be arrived at upon the exercise of judicial discretion as to the propriety of the compromise in the interests of the minor. The same view has been taken by the Bombay Court in *Virupakshappa v. Shpidappa* (5) where Jenkins C. J. laid down that the general law was even more favourable to a minor than section 462, Civil Procedure Code, and by the Allahabad Court in *Kalavati v. Chedi*

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Maidil.

Sri P. S. Ballav Sen

Sri A. B. Chandra Sen

NOT EXCHANGEABLE AND

NOT BALANCE.

(1) (1871) 46 W. R. 232.

(3) (1907) 8 C. L. J. 266.

(2) (1883) 1, L. L. 9 Cal. 810

(4) (1902) 7 C. W. N. 90.

(5) (1901) 1, L. R. 26 Bom. 109.

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Mandol.

Lal (1) where it was held that in order to make an agreement or compromise, to which section 462 applies, lawful, it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise and before making the agreement or entering into the compromise should obtain permission from the Court. The Court should record the fact that such application was made to it ; that the terms of the proposed agreement of compromise were considered by the Court ; and that having regard to the interest of the minor, the Court granted leave.

A similar view was taken in the Madras Court in *Govinda-sami Naida v. Alagirisami Naida* (2), following the English case of *Birchall Wilson v Birchall* (3), where Jessel M. R. stated that the practice he followed and that followed by Lord Romilly before him had been to require not only that the compromise should be assented to by the next friend or guardian, but that his solicitor should make an affidavit and that his counsel should give an opinion that he believes the compromise to be for the benefit of the minor. Against this long established and weighty body of authority, it is urged that in none of these cases had leave been obtained and in none of them was the decree set aside on the ground that the Court had not sufficiently considered the question of the minors' interest, and a recent decision of this Court in the case of *Midnapore Zemindari Co. Ltd. v. Gobinda Mahto* (4) is cited, in which it was held that it must be assumed, in the absence of any evidence to the contrary, that the Court did its duty in the matter, and was satisfied before giving permission that the compromise was for the benefit of the minors concerned. Now as to this, we may observe in the first place that none of the above rulings were apparently considered or cited at the Bar ; that permission was given to compromise and not merely to file a petition, and that we entirely agree with the principle that when the Court permits a compromise, it must be presumed, in the absence of evidence to the contrary, that it gave due consideration to the matter.

But in this case, as we have shown, the record clearly shows that the guardian neglected the minor's interest and that the Court, without making an enquiry, passed an order prejudicial to the minor and not an express sanction to the compromise. When the question of setting aside such a decree arises, the true rule

(1) (1895) I. L. R. 17 All 531.

(2) (1905) I. L. R. 29 Mad 104

(3) (1880) L. R. 16 Ch D 41.

(4) (1907) 8 C. L. J. 31.

is laid down in *Aman Singh v. Narain Singh* (1), where it was held that although in appeal such a decree would be held to be invalid as against a minor, it could not, after it had become final and been acted upon, be set aside unless it were shown to be prejudicial to the minor.

Here it is clear that the decree, so far as it binds the plaintiff personally and his property other than that mortgaged, was prejudicial to the minor and that there was no valid sanction to the compromise.

The learned vakil for the respondent frankly concedes that if we are against him on this point, he has no objection to the plaintiff obtaining a declaration that the decrees, so far as they affect him personally and his properties movable and immovable other than the properties mortgaged, are inoperative, and such is the order we propose to pass.

There can be no question of setting aside the decrees as regards the mortgaged properties. Even apart from the clear right of alienation vested in the incumbent for the time being under the rule of primogeniture above referred to, the mortgages were clearly entered into for ancestral debts which would have been equally binding on the plaintiff even if he had had a joint interest in the ancestral properties. We, therefore, direct that the appeals be decreed in part and that the decrees of the Court below be modified and that in lieu thereof it be declared that the decrees in suits Nos 35 and 36 of 1903 are not binding on the plaintiff so far as his person and properties movable or immovable other than the mortgaged properties are concerned with, } costs to the appellant from the respondents in both Courts and that his suit as regards the mortgaged properties be dismissed with } costs to respondents, the result being that appellants will pay half the costs of the respondents in both Courts.

A. T. M.

Appeals decreed in part

(1) (1897) 1 L. R. 29 All. 98.

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Krishna Pershad Roy
v.
Rames Chunder
Mandol.

*Before the Hon'ble R. F. Rampini, Acting Chief Justice and
Mr. Justice Ryves.*

PULIN CHANDRA MANDAL AND OTHERS

v.

BALAI MANDAL AND OTHERS. *

CIVIL.

1908.

June, 23.

*Hindu Widow—Alienation of portion of estate—Consent of next reversioner—
Validity.*

An alienation by a widow of a portion of her husband's estate is valid if made with the consent of the next reversioner. The principle is not restricted to the case of alienation of the whole of the property.

Nobo Kishore v Hari Nath (1), *Hem Chunder v. Sarnomoyi* (2), *Vinayak v. Govind* (3), *Bayrang v. Manokarnika* (4), and *Annada Kumar v. Indra Bhushan* (5), followed.

Behari Lal v. Madhu Lal (6), explained

Marudamuthu v. Srinivasa (7) not followed; *Radha Sham v. Joy Ram* (8) distinguished.

Appeal by the Plaintiffs.

Suit to set aside an alienation by a Hindu widow.

The facts of the case shortly stated were as follows :

The disputed land belonged originally to Srinath Mondal. The plaintiffs were the sons of Srinath's deceased brother Loke Nath; on the death of Srinath, his widow held the lands as his heiress. The plaintiffs alleged that on the death of the widow they got possession of the lands as Srinath's heirs, but were dispossessed by the defendants in Assar 1312, on the allegation that they purchased them from the widow by a *kobala*, that the said *kobala* was invalid for want of consideration, that the widow had no legal necessity for selling the properties and that as such also the *kobala* was invalid.

The defendants in reply urged that the *kobala* was a *bonafide* document executed for valid consideration, that the widow was unable to maintain herself from the properties inherited by her, that she sold the properties for legal necessity and that the transaction was valid in law.

The finding of the Courts below was that the immediate cause of the sale was the giving of dowry to the bride in con-

* Appeal from Appellate Decree No. 674 of 1907 against the decision of C. W. E. Pittar Esq., District Judge of Murshidabad dated the 8th January 1907 affirming that of Babu Birendra Kumar Dutt, Munsiff, Kandi, dated the 3rd July 1906.

(1) (1884) I. L. R. 10 Calo. 1102.

(2) (1894) I. L. R. 22 Calo. 354.

(3) (1900) I. L. R. 25 Bom 129

(4) (1907) 6 C. L. J. 766 : I. R. 35 I. A. 1; I. L. R. 30 All. 1.

(5) (1907) 12 C. W. N. 49.

(7) (1897) I. L. R. 21 Mad. 128.

(6) (1891) I. L. R. 19 Calo. 236.

(8) (1890) I. L. R. 17 Calo. 896.

nection with the widow's daughter's sons' marriage; the consideration money of the *kobala* was not paid in cash, but that the widow, her daughter and her daughter's son sold the properties to defendant No. 4 at the alleged value of Rs. 100, but really in consideration of the defendant No. 4 giving up the amount which they would have to pay as dowry to defendant No. 4's daughter when the said widow's daughter's son married. Hence the Munsiff held that the *kobala* was executed for good consideration. It was further held, that the *kobala* was executed not only by the widow, but also by the two next reversionary heirs, *viz.*, the daughter and the daughter's son. Both the daughter and the daughter's son died after the sale, but before the institution of the suit.

The District Judge held that the alienation was valid, although there was no legal necessity for the sale, the marriage of a daughter's son not constituting legal necessity; that the decisions of the Calcutta High Court to the effect that a grant by a Hindu widow with the sanction and concurrence of the next reversioner were applicable to a case in which a portion only of the estate had been alienated and relied on *Behari Lal v. Madho Lal* (1).

Babu Ram Chander Mojumdar for the Appellant.—The case of *Nabokishore Sarma Roy v Hari Nath Sarma Roy* (2), is in my favour. The ground of the decision was thus stated at page 1108 of the Report by Garth, C J "But, if it is once established, as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation, which the widow and the next heir may thus agree to make." There can not be a relinquishment of part of the estate. In *Behari Lal v. Madho Lal Ahir Gaywal* (1), their Lordships observed as follows: "It may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances." The words used were "whole estate" and not "portion of the estate." The case of *Bajrangi Singh v. Manokarnika Baksh Singh* (3), does not touch the point at issue in the case.

(1) (1891) I. L. R. 19 Calo. 236.

(2) (1884) I. L. R. 10 Calo. 1102 (F. B.)

(3) (1907) 6 C. L. J. 766; L. R. 35 I. A. 1; I. L. R. 30 All. 1.

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[RYVES J.—In that case, there were several alienations ; one set of reversioners consented at one sale and other set at other sales].

The consent was given after all the sales were completed. Hence the consent was given to one complete alienation.

In *Marudamuthu Nadan v. Srinivasa Pillai* (1), this question was decided, by a Full Bench, consisting of Shepherd, Subramania Ayyar, Davies and Boddam JJ. "A Hindu widow with the consent of A, the then nearest reversioner, sold part of the property inherited by her from her husband. A predeceased the widow, and on her death B, C and D were the nearest reversioners, and they now sued to recover the property. It appeared that the sale was not justified by circumstances of legal necessity, and that D had not been born before the sale had taken place : Held, that the sale was not binding on the plaintiffs or any of them." This case is directly in my favour.

In the case of *Radha Shyam Sircar v. Jey Ram Senapati* (2), (decided by Prinsep and Rampini JJ.) it was held that an alienation of a portion of a widow's estate was not valid. Their Lordships at page 900 observed as follows "But in our opinion the principle enunciated by the Full Bench (3) cannot be carried to this length, and can not be applied to an alienation of only a portion of the widow's estate."

Read passages from Dayabhaga and Mayne's Hindu Law and Usage.

Babu Ashutosh Mukerji for the Respondent.—The case of *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (3), is in my favour. That case was applicable to alienations of whole as well as a portion of the estate. The alienation by the widow must be by destroying her life estate. That was the condition imposed by the Privy Council in *Behari Lal v. Madho Lal Ahir Gayawa*. (4). In that case it was found that the widow had not relinquished her life interest in the disputed property, and for the purpose of that case, there was no necessity for a pronouncement as to whether any distinction could be made between a surrender of the whole or part of a life estate.

The case of *Marudamuthu Nadan v. Srinivasa Pillai* (1) wrongly interpreted the observations of their Lordships in the last case. I therefore submit it was wrongly decided.

(1) (1897) I. L. R. 21 Mad 128 (F. B.) (2) (1890) I L R. 17 Calc 806

(3) (1884) I L. R. 17 Calc. 1102 (F. B.)

(4) (1891) I. L. B. 19 Calc. 236 (P. C.)

In *Hem Chunder Sanval v. Sarnamovi Debi* (1), their Lordships (Norris and Banerjee JJ.) observed at page 361 : "Touching the Hindu widow's power of alienation otherwise than for legal necessity, two propositions appear to us to be well established.

"First, the widow may relinquish the whole of her interest in her husband's estate, and then the next reversioner will acquire the estate absolutely. The reason of this is that it is the intervention of the widow that postpones the succession of the reversioner, and if she walks out of the scene, she thereby anticipates for the reversioner the time of his succession.

"Second, the widow may convey to the next reversioner, or to a third party with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest." The second proposition is directly in my favour. In that case an alienation of a moiety of the properties was held valid.

In *Bapangti Singh v. Manokarnika Baksh Singh* (2), part of the estate inherited by the widow was alienated. Their Lordships stated the facts of the case thus : "He was absolute owner of an estate known as Pindara Kaman and other property, which at his death passed to his widow, and, at her death would have passed to his daughters &c." The whole of the estate Pindara was alienated at different times, but the other property was not. Thus in that case the whole was not alienated and their Lordships held the alienation valid.

In *Tanyak v. Gorind* (3), an alienation of a part was held good. It was decided by Jenkins C. J. and Ranade J.

The Full Bench case of *Nobokishore Sarma Roy* (4), gave effect to the existing case law on the subject, being to a great extent guided by the consideration that they would be disturbing titles acquired upon the strength of that law if they were at that period to overrule the previous decisions.

The case of *Radha Shyam Sircar* (5), was decided on the ground that the consent of all the reversioners was not given. See the case reported in the footnote of that case.

The case of *Annada Kumar Roy v. Indra Bhusan Mukhopadhyaya* (6), also shows that an alienation of a part is valid. •

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(1) (1894) 1 L. R. 22 Cal. 354.

(2) (1907) 6 C. L. J. 766, L. R. 35 I. A. 1, I. L. R. 30 All. 1.

(3) (1900) 1 L. R. 25 Bom. 129.

(5) (1890) 1 L. R. 17 Cal. 896.

(4) (1884) 1 L. R. 10 Cal. 1102 (F. B.)

(6) (1907) 12 C. W. N. 49.

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Babu Ram Chunder Mojumdar in reply.—The observations in the case of *Hem Chunder Sanyal* (1) are *obiter*. Not one of the cases referred to in *Nobokishore Sarma Roy* (2) deals with an alienation of part of the estate.

The case of *Vinyak v. Govind* (3) was decided on a different principle. The principle of the decision was that the alienation made with the consent of the reversioner was presumed to be for legal necessity. The Full Bench case of *Nobokishore Sarma Roy* (2) was decided on the principle of acceleration of the whole estate. So the Bombay case is no authority here.

In the case of *Bajrangi Singh* (4) the whole was alienated.

The case of *Annada Kumar Roy* (5) is no authority for the proposition contended for. There, no question as to alienation of part was raised. There, one of the reversioners sued for his share of the estate.

C. A. V.

The judgment of the Court was delivered by

June, 23.

Rampini C. J.—The question contested before us in this second appeal is, whether the alienation by a Hindu widow of a portion of her husband's estate without legal necessity but with the consent of the next reversioner is valid or not, or whether an alienation by a Hindu widow in such circumstances is valid only if she alienates the whole of her husband's property. The Judge in the Court below has decided that a widow may alienate a portion of her husband's property if the next reversioner consents. The appellant's pleader contends that this view is incorrect and that, unless the Hindu widow alienates the whole of her husband's property and so, as it were, surrenders the whole of her interest in the whole of her husband's property, the alienation is invalid. The learned pleader for the appellant has cited the following cases in support of his view, *viz* *Behari Lal v. Madho Lal Ahir* (6) *Marudamathu Nandan v. Srinivasa Pillai* (7) *Radha Shyam Sircar v. Ram Senapati* (8) By the other side, the cases of *Nabo Kishor Sarma v. Hari Nath Sarma* (9) *Hem Chandra Sanyal v. Sarnomayi Debi*, (10) *Vunayai Vithal v. Govind*, (11) *Bajrangi Singh v. Manokarnika*, (12) and

(1) (1894) I. L. R. 22 Calc. 354.

(3) (1900) I. L. R. 25 Bom. 129.

(4) (1907) 6 C. L. J. 766; L. R. 35 I. A. 1; I. L. R. 30 All. 1.

(5) (1907) 12 C. W. N. 49.

(6) (1891) I. L. R. 19 Calc. 236; (9) (1884) I. L. R. 10 Calc. 1102.

(7) (1897) I. L. R. 21 Mad. 128; (10) (1894) I. L. R. 22 Calc. 354.

(8) (1890) I. L. R. 17 Calc. 896; (11) (1903) I. L. R. 25 Bom. 129.

(12) (1907) I. L. R. 35 I. A. 1.

Annada Kumar Roy v. Indra Bhushan Mukhopadhyaya (1) have been relied on.

We are of opinion that the view of the learned District Judge is correct, and that a Hindu widow may validly alienate a portion of her husband's property with the consent of the next reversioner. There would seem to be no reason why she should not do so, or why to make a valid alienation she must convey or surrender the whole of her husband's property. The only direct authority for such a view is to be found in the judgment of the Madras High Court in *Marudamuthu Nadan v. Srinivasa Pillai*, (2) in which two former judgments of the Court to the contrary effect are overruled, but the decision in this case would seem to be based on a mistaken interpretation of the rule laid down by their Lordships of the Privy Council in *Behari Lal v. Madho Lal Ahu* (3) viz., that the surrender must be absolute and complete and that the whole estate should be withdrawn. This does not, we think, mean that the husband's whole property must be alienated. It only means that the whole estate of the widow in the husband's property must be withdrawn and that she cannot retain any interest in it. In the case of *Radha Sham Sutar v. Jay Ram Senapati*, (4) some of the reversioners only consented to the alienation, and, for this reason, it was held to be invalid as being an alienation of only a part of the Hindu widow's interest. The case reported in the foot-note at page 900 shows that this was the meaning of this judgment. The case of *Behari Lal v. Madho Lal Ahu* (3) has been considered by the District Judge in his judgment, and, we think must be interpreted in the way in which, while alluding to Mr. Justice Subramaniya Aiyar's judgment in *Marudamuthu v. Srinivasa Pillai* (2), we have indicated it should, in our opinion, be construed.

On the other hand, the Full Bench decision in the case of *Nobo Kishore Sarma v. Hari Nath Sarma* (5) broadly lays down that "under the Hindu law current in Bengal, a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the

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(1) (1907) 12 C. W. N. 49 ;

(3) (1891) 1 L. R. 19 Calc. 236

(2) (1897) 1 L. R. 21 Mad. 128 ;

(4) (1890) 1 L. R. 17 Calc. 896 ;

(5) (1884) 1 L. R. 10 Calc. 1102,

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property." The Full Bench make no distinction between an alienation of the whole or of a part of the property. Then, in the case of *Hem Chandra Sanyal v. Sarnamoyi Debi*, (1) it has been expressly said : " The widow may convey to the reversioner or to a third party, with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest." It is objected that this is an *obiter dictum* but it is the view of a distinguished Hindu lawyer. The case of *Vinayak v. Govind*, (2) is a direct authority for holding that a Hindu widow may validly alienate portions of her husband's property with the consent of the next reversioners. The case of *Bajrangji v. Manokarnika*, (3) is also an authority for this view. In this case, portions of the husband's property were alienated on different occasions between 1872 and 1875. The subsequent consent of the reversioners, though given in 1877 and 1878, was held to validate the alienations. Again, in *Annada Kumar Ray v. Indra Bhusan Mukhopadhyaya*, (4) the alienation by a Hindu widow of the half-share of her husband's property in favour of the then reversioner was held to be legal and valid.

The consensus of authority is accordingly in favour of the view taken by the learned District Judge.

We dismiss the appeal with costs.

N. K. B.

Appeal dismissed.

(1) (1894) I L. R. 22 Calc. 354.

(3) (1907) I L. R. 35 I. A. 1.

(2) (1900) I L. R. 25 Bom. 129.

(4) (1907) 12 C. W. N., 49.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

NAGENDRABALA DEBYA

v.

TARAPADA ACHARJEE AND ANOTHER.*

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1908.

July, 15, 24.

Added plaintiff—Pro forma defendant joined as Plaintiff—Limitation Act (of 1877), Sec. 22.

Where a person, who was at the institution of a suit made a *pro forma* defendant, subsequently is joined as a plaintiff, Sec. 22 of the Limitation Act does not apply. In such a case the added plaintiff is not a 'new plaintiff.'

Abdul Rahman v. Amir Ali (1) and *Ram Kinkar v. Akhil Chandra* distinguished.

Appeal by the Defendant.

Suit for rent.

* Appeal from Appellate Decree No. 693 of 1907, against the decision of Babu Radhanath Sen, Subordinate Judge, Rajshahi, dated 15th Decr. 1906, affirming that of Babu Satish Chandra Biswas, Munsiff of Naogaon, dated the 26th February 1906.

(1) (1907) 5 C. L. J. 486 ; I. L. R. 34 Calc. 612.

(2) (1907) I. L. R. 35 Calc. 519.

The material facts and arguments appear from the judgment.

Babu Mohini Mohan Chakravarti for the Appellant.

Babu Satish Chandra Ghose for the Respondents.

C. A. V.

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1908.

Nagendrabala Deby

Tarapada Acharjee

July, 24.

The following judgment was delivered :

This is a suit for two years rent of a *putni* holding and was originally brought by plaintiff No. 1, one of the respondents before us, at a period when no portion of the claim was barred by any limitation. Plaintiff No. 1 is an 8 annas co-sharer of the holding and as his co-sharer refused to join him, he made him a *pro forma* defendant. He stated in his plaint that he sued for the entire 16 annas of the rent due, but at the same time he asked to have awarded to him only half of the money actually due. The suit was decreed *ex parte*, but was subsequently re-opened under section 108, Civil Procedure Code, on defendants applying a year after. After this, plaintiff No. 1 procured the amendment of his plaint in two ways, namely by having a guardian *ad litem* appointed for the first defendant, and a description of the *pro forma* defendant as an executor to a deceased lady added to his name.

The *pro forma* defendant also procured himself to be made a plaintiff instead of a defendant. All these changes were made after the expiration of three years from the time when rent last became due ; and in the Court below it was argued that each of them caused the suit to be time-barred under section 22 of the Limitation Act. The first two changes, the introduction of a guardian and the description of defendant No. 2 were not relied on before us, as bringing section 22 into operation, and we have only to consider the effect of changing defendant No. 2 into a plaintiff, after the expiration of the period of limitation. Had he been then brought into the suit for the first time, there would be no doubt that the section would apply ; see *Abdul Rahman v. Amir, Ali* (1) where an assignee was substituted as plaintiff for the assignor under section 372, Civil Procedure Code, and *Ram Kinkar Biswas v. Akhil Chundra Chowdhuri*, (2) where a defendant was added under section 32. In both these cases, however, the added party was brought into the suit for the first time by the order of the Court. Here, the added plaintiff was brought into the suit at its institution ; his interest was that of a plaintiff, and the original plaintiff had a right to enforce his interest as a

(1) (1907) I L. R. 34 Calc. 612.

(2) (1907) I. L. R. 35 Calc. 519.

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Tarapada Acharjee.

co-sharer. The Chief Justice in *Abdul Rahman v. Amir Ali* (1) describes a new plaintiff as a person who has not before been a plaintiff; but we cannot think that this ought to be held as excluding a person in the position of the added plaintiff in this case. In *Krishna v. Mekamperuma* (2), two defendants were added as plaintiffs at a time when their remedy was time-barred, but this was done against their wishes and they were not entitled to the same relief as the original plaintiffs. This was held to be irregular, and they were replaced in their original position as defendants. Here the facts are just the reverse, and the course followed there is not open to us. Nor according to the *The Oriental Bank v. Charriol* (3), as explained in *Guruwayya v. Dattatraya* (4) and in *Ram Kinkar Biswas v. Akil Chandra Chaudhuri* (5) can we hold that the addition was irregular merely because it was after the period of limitation. If the added plaintiff is to be treated as a new plaintiff, the original plaintiff will lose all the advantage that he sought to derive from making him a defendant at first. To hold that the added plaintiff is not a new plaintiff seems to be in accordance with the decision of the Madras Court, and not inconsistent with the decisions of this Court. It is further to be observed that there is no question of the original plaintiff being debarred from his remedy by section 22, as the section applies only to the added plaintiff, and in this case it is probable, though we need not actually decide the point, that the original plaintiff, on his present plaint, could have recovered the remedy that he now seeks, without the added plaintiff appearing in the suit at all, and he could certainly have recovered it on a properly drafted plaint, which brings the case within the rule laid down in the Bombay decision we have referred to.

This view of the case obviates any difficulty arising from the question of whether the original plaintiff sued for 16 annas or 8 annas of the rent, and this appeal is therefore dismissed with costs.

N. K. B.

Appeal dismissed.

(1) (1907) I. L. R. 34 Calc. 612.

(3) (1886) I. L. R. 12 Calc. 642.

(2) (1886) I L R 10 Mad 44.

(4) (1903) I L. R. 28 Bom. 11 at 20.

(5) (1907) I. L. R. 35 Calc. 519.

*Before Sir Francis W. Maclean K. C. J. E., Chief Justice and
Mr. Justice Holmwood.*

PURNENDU NARAIN ROY AND OTHERS

v.

DWIJENDRA NARAIN ROY.*

CIVIL.

1907.

May, 14.

*Easement—Way, right of—Implied grant—Alternative defences—No objection—
No prejudice.*

No grant of an easement can be implied from a defendant using a land for eight years without any objection on the part of the plaintiff.

Per Mookerjee J.—There is no implied reservation of an easement in case one transfers a part of his land over which he has previously exercised a privilege, in favour of the land he retains, unless the burden is apparent, continuous and strictly necessary for the enjoyment of the land retained.

Suffield v. Brown (1), *Wheeldon v. Burrows* (2), *Russell v. Watts* (3) and *Ram Narain v. Kamala Kanta* (4) referred to.

Implication of a grant of easement, upon the severance of a tenement, extends to a way which is a formed or metalled road.

It is open to a defendant to set up alternative defences, *e. g.* to set up as a defence, that he was the owner of the property in dispute and if he was not the owner, he had a right of easement over it.

Narendra Nath v. Abhaya Charan (5) applied

A plaintiff will not be allowed to raise any objection as to defendant's setting up alternative defences, at the appellate stage of the suit, when no such objection was raised in the Court of first instance and it was not shown that he was in any way prejudiced.

Durgamani v. Ambika Charan (6) referred to.

Appeal by the Defendants (Respondents in second Appeal.)

Suit for recovery of possession of land.

The facts and arguments appear from the judgment of Mookerjee J.

Dr. Rash Behary Ghose and Babu Hemendra Nath Sen for the Appellant (In second appeal)

Babu Ram Chandra Mazumdar for the Respondents.

C. A. V.

The case was argued on 24th August 1906, and the judgment against which the present appeal was preferred was delivered on 12th November 1906 by

Mookerjee J.—This is an appeal on behalf of the plaintiff in

* Letters Patent Appeal No. 124 of 1906 from the decision of Hon'ble Mr Justice Mookerjee, dated 12th November 1906, in Appeal from Appellate Decree No. 1496 of 1905, against the decree of W. H. Lee Esq., District Judge of Murshidabad, dated 8th June 1905, affirming that of Babu J. N. Chakravarti, Munsiff of Kandi, dated 4th January 1905.

(1) (1854) 4 De. Gex. J & S 185, 46 E. R. 888.

(2) (1879) 12 Ch. D. 31.

(3) (1883) 25 Ch. D. 559

(4) (1899) 1 L. R. 26 Calc. 811.

(5) (1906) 4 C. L. J. 437; 1 L. R. 34 Calc. 51.

(6) (1906) 4 C. L. J. 367.

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an action for recovery of possession of a small parcel of land, which at one time belonged to both the parties to this suit. The defendants are all uterine brothers, and the plaintiff is their step-brother. Their father died in 1891, and some time after, they effected a division of their properties by an award of arbitrators in May 1896. Under the award, the parcel in dispute fell to the share of the defendants Nos. 2 and 3. Subsequently, on the 28th August 1896, by a *mimanasapatra* or a deed of settlement, there was an exchange of some of the properties between the parties, and under this deed, the parcel in suit was given to the plaintiff. The plaintiff alleges that in January 1903, his possession was disturbed by the defendants who claimed a right of way over the disputed land. He consequently prays for declaration of title, for confirmation of possession, and also for the grant of a perpetual injunction, restraining the defendants from using the land as a private pathway. The defendants resisted the claim substantially on two alternative grounds. In the first place, they contended that assuming that the plaintiff was the owner of the property, they had a right of way over it. This right, they based upon one or more of several grounds, namely, either because the way had existed from time immemorial, or because it was an easement of necessity, or because at the time the exchange took place on the basis of the *mimanasapatra* in 1896, there was an understanding between the parties, that the defendants would continue to exercise the right of way as before. In the second place, they put forward the alternative contention, that the plaintiff had no subsisting title to the property, because they had obtained it from him by exchange about two months after the date of the *mimanasapatra*. Upon these pleadings, the following issues were framed : (1) Have the defendants a right of way over the disputed land ? (2) Is the way an easement of necessity for the defendants ? (3) Did the plaintiff give the disputed land to the defendants in exchange for other land ? The Court of first instance found upon the second and third issues in favour of the plaintiff holding that the plaintiff had a subsisting title, that the story of exchange set up by the defendants was untrue, and that the defendants had no easement of necessity inasmuch as they had at least two other ways by which they could go from their new corridor to their store house. Upon the first issue, the learned Munsiff found, that as the property had been joint up to 1896, the defendants could not have acquired any prescriptive right of way over it under section 26 of the Indian Limitation

Act. He also found that as the alleged way was not formed or metalled road, but an undefined tract with no permanence in the adaptation of the tenement from which continuity could be inferred, the defendants could not have any right by implied grant, as explained in the case of *Ram Narain v. Kamala Kanta* (1). But the learned Munsiff held, that as the defendants had been allowed by the plaintiff to use the way for a period of eight years, without any objection on the part of the plaintiff, it must be taken that the defendants had acquired some right under an implied grant from the plaintiff, who was equitably estopped from questioning the validity of the right claimed. He accordingly gave the plaintiff a decree declaring his title and entitling him to recover possession, if he has actually been dispossessed, but he refused to grant an injunction restraining the defendant from exercising a right of way over the land. Against this decree, both the parties appealed to the District Judge, the plaintiff, on the ground that the defendants had not acquired any right of way, and the defendants, on the ground that their title had been established by the evidence. The learned District Judge has dismissed both the appeals. The plaintiff has appealed to this Court, and the defendants have filed a memorandum of cross-objections which, however, have not been pressed at the hearing before me. Consequently, the concurrent finding of the Courts below, that the land in dispute belongs to the plaintiff, remains unchallenged, and the only questions which require consideration are those raised in the plaintiff's appeal, and these are reducible to two. It is contended in the first place, that it was not open to the defendants to set up alternative cases, and it is argued in the second place, that upon the facts found, the defendants have no right of way.

As regards the first contention, it cannot be successfully maintained in view of the recent decision of the Full Bench in the case of *Narendra Nath v. Abhaya Charan* (2). The principle which underlies that decision is, I think, applicable quite as much to a plaintiff, as to a defendant, and I must hold that it is open to a defendant to set up alternative defences, *e.g.*, to set up as a defence, that he was the owner of the property in dispute, and if he was not the owner, he had a right of easement over it. Besides, in the present case, no objection appears to have been taken in the Court of first instance, on behalf of the plaintiff, to the form of the defence; nor is it suggested that the plaintiff has been in any way prejudiced; it is, therefore, too late for the

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(1) (1899) I. L. R. 26 Calc. 311.

(2) (1906) 4 C. L. J. 437.

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plaintiff to take the objection now. (*Durgamani v. Ambica Charan* (1).)

As regards the second contention, the facts appear to be as follows : the property was joint up to 1896, when upon partition and exchange, it fell to the share of the plaintiff. According to the case of the defendants, they had, at the time of the partition a way over it ; but the learned District Judge observes, that it is not clear upon the evidence whether they used to use the path a long time back ; he further finds, that it is not clear whether the door opened by the defendants in their own building leading to the way was opened by them, as they allege in 1897, immediately after the partition, or in 1901 as the plaintiff asserts. Under these circumstances, it is difficult to see how the defendant have acquired a right of way. Clearly, they have not acquired any prescriptive right under the Statute. It is not suggested that there was any express grant of any right of way at the time of the exchange. The learned vakil for the respondents concede that he is not prepared to contend that there was an implied reservation at the time of the exchange. Indeed, having regard to the undoubted facts of this case and the authorities on the subject, it is difficult to see how any other view could be maintained. In the first place, it is doubtful, according to the finding of the learned District Judge, whether there was at the time of the partition and exchange, an existing right of way ; at any rate there was none which had been used for any length of time ; and clearly, as the Munsiff finds (which finding does not appear to have been challenged before the District Judge), whatever way there might have been, was not a formed or metalled road but an undefined track. In the second place, there is no implied reservation of an easement in case one transfers a part of his land over which he has previously exercised a privilege, in favour of the land he retains, unless the burden is apparent, continuous and strictly necessary for the enjoyment of the land retained. In support of this proposition, it is sufficient to refer to the cases *Suffield v. Brown* (2) *Wheeldon v. Burrows* (3) *Russell v. Watt* and to the summary of the law as stated in Goddard on Easements 6th Ed. p. 192. The same view was taken by Banerjee and Ramp J.'s in *Ram Narain v. Kamala Kanta* (5). It follows, consequently, that the defendants cannot succeed on the ground that

(1) (1906) 4 C L J. 367.

(3) (1879) 12 Ch. D. 31.

(2) (1864) 4 DeG. J. & S. 185.

(4) (1883) 25 Ch. D. 559.

(5) (1899) 1 L. R. 26 Calc. 311.

there was an implied reservation of a way over the land in suit, at the time they transferred it to the plaintiff. The learned vakil for the respondents did not challenge this view, and indeed, he conceded that the judgment of the District Judge could not be supported on the ground stated therein. He suggested, however, that there was some arrangement between the parties in 1897, under which the plaintiff granted this way to the defendants. No such case, however, was made in the pleadings, nor is it raised in the issues, and no trace of it can be found in the judgment of the learned District Judge. The defendants cannot be allowed, at this stage, to make a new case on the facts. I may add that no attempt was made before me to support the view of the Munsiff as to equitable estoppel; no such question was raised in the pleadings or in the issues, and it does not appear to have been argued before the District Judge. On the whole, therefore, I must hold, that the defendants have failed to establish any legal ground upon which their claim to a right of way can be supported.

The result, therefore, is that this appeal must be allowed, and the decree of the Court below varied. The decree will not only declare the plaintiff's title and entitle him to recover possession, but it will also declare that the defendants have no right of way over the disputed land, and will grant a perpetual injunction restraining them from using the land as a private pathway. The plaintiff is entitled to his costs in all the Courts.

Babu Ram Chandra Mazumdar for the Appellants

Babus Digambar Chatterjee and Hemendra Nath Sen for the Respondents

The judgment of the Court was as follows :

Maclean C. J.—I think the conclusion at which Mr. Justice Mookerjee has arrived is quite right. The land in dispute admittedly belongs to the plaintiff. It is a miserable piece of land, the whole subject-matter of the suit being valued at Rs. 30. The defendant says that he has a right of way over the land. The District Judge says that the defendant has a right of way by implied grant. One can obtain a right of way over another's property in several ways. According to the facts found in this case, the defendant has used a right of way over the disputed land for eight years : he cannot be said to have got a right of way by prescription. Then, there is nothing to show that he got it by express grant. What is there to suggest that there was an implied grant ? There is nothing to show that. It is suggested

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that some seven or eight years ago, there was an agreement between the parties that the defendant should have a right of way over this land and the plaintiff should have a right of way through the defendant's land. If that is so, that is not a question of implied grant, but is a question of agreement, which is susceptible of proof, but of which there is no evidence. The Munsiff seems to have inferred from the fact that for eight years the defendant was using the land without any objection on the part of the plaintiff that a grant must be implied. This is not so. The defendant might have used the road with the permission of the plaintiff, and, subsequently the parties fell out and the plaintiff withdrew the permission. There was, therefore, no implied grant.

I think, for these reasons, without going into any authorities, that the judgment of Mr. Justice Mookerjee is right, and the appeal must be dismissed with costs.

Holmwood J.—I agree.

A. T. M.

Appeal dismissed.

Before Sir Francis W. Macleay, Kt., K.C.I.E., Chief Justice and Mr. Justice Coxe.

ANNADA KRISHNA DEY

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1908.

January, 31.

JOGENDRA NATH DEY AND OTHERS.*

Civil Procedure Code (XIV of 1882) Secs. 80, 462, 506, 624, 629—Notice, Service of, if proper—Service on the outer-door of the office—Review, order on, if can be questioned in appeal from final decree—Guardian of minor applying to refer to arbitration—Leave or consent of Court if necessary.

Affixing a notice to the outer-door of the office in which the person to whom the notice was addressed works as an employee, is not a good service under section 80 of the Code of Civil Procedure.

Under section 629 of the Code of Civil Procedure, it is open to the appellant on the appeal from the final decree, to take objection to the order passed on the application for review.

A Judge (not being a Judge of the High Court), other than a Judge who delivered the judgment, has no jurisdiction to grant an application for review on the ground that no leave or consent of the Court under section 462 of the Code of Civil Procedure had been given to the guardian *ad litem* to refer the matter in dispute between the parties to the suit to arbitration.

Semble—Such leave or consent of the Court to the application by al

* Appeal from Original Decree No. 182 of 1906, against the decree of Babu Jogendra Nath Mukerji, Subordinate Judge, Court, 24-Parganas, dated the 31st January 1908.

the parties to refer the matter to arbitration is not necessary under section 462 of the Code of Civil Procedure. •

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— *Hardeo Sahai v. Gauri Shankar* (1) approved.

Lakshmana Chetti v. Chinnathambi Chetti (2) not followed.

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Appeal by the Plaintiff.

Suit for partition.

The facts of the case shortly stated were as follows :—

A suit for partition was instituted, and a decree was passed in terms of award made by arbitrators, to whom the matters in dispute in the suit were referred by order of Court on the application of the parties under section 506, Civil Procedure Code. Some of the parties were minors and the application for reference was made by their guardian on their behalf; but no leave or consent of the Court under section 462, Civil Procedure Code, was given. The minors, therefore, applied for a review of judgment to a Judge other than the Judge who delivered the judgment. Their application was twice rejected, and a notice of the third application was served on the plaintiff by affixing it (notice) to the outer-door of the office in which he had been working without making any attempt to serve on him personally. The suit was revived but dismissed for non-appearance of the plaintiff. Against the decree dismissing the suit, the plaintiff appealed. •

Babu Baranasibasi Mukerji for the Appellant.—The appellant in appealing against the final decree can attack the order granting review, see section 629, Civil Procedure Code.

No notice was served according to law upon the appellant. No inquiry was made about him before making a substituted service. See *Rajendro Nath Sanjal v. Jan Meah* (3) and *Kali Narain v. Sheikh Bajoo* (4). Besides, substituted service can only be made at the dwelling house, see section 80, Civil Procedure Code. The order granting review, therefore, ought to be set aside; see sections 626, 629, Civil Procedure Code.

The order granting review is also bad, because the Judge had no jurisdiction to entertain the application. See section 624 Civil Procedure Code. Here there was no “discovery of new matter or evidence” nor was there any “clerical error.” •

The learned Subordinate Judge was also wrong on the merits. No leave of the Court is necessary for a reference to

(1) (1905) I. L. R. 28 All. 35.

(2) (1900) I. L. R. 24 Mad 326

(3) (1898) I. L. R. 26 Cal. 101

(4) (1898) 3 C. W. N. 307

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arbitration by order of the Court. The reference is an act of the Court and not of the parties, although an application from all the parties is necessary under section 506, Civil Procedure Code. There was neither an agreement nor a compromise, for which alone leave is necessary under section 462, Civil Procedure Code. See *Hardeo Sahai v. Gaurishankar* (1). This question was also raised before the Privy Council, but their Lordships thought that "there did not appear to have been any substance in it." See *Ghulam Khan v. Muhammad Hassan* (2).

Babu Brojolah Chuckerbutty (with him Babu Narendra Chandra Bose) for the Respondents.—The appellant can not ask the Court to set aside the final decree only on grounds which would vitiate the order granting review. There must be independent grounds for attacking the final decree. He ought to have preferred an appeal against the order granting review.

Whether notice was served or not, can be determined on evidence alone, and the proper course for the appellant would be to apply to the lower Court.

The lower Court had jurisdiction and the application was not barred under section 624, Civil Procedure Code; for the word "error" in that section is co-extensive in signification with the words "mistake or error" in section 623, Civil Procedure Code.

Reference to arbitration stands on the same footing with a compromise, and leave of Court is therefore necessary; see *Lakshmana Chetty v. Chinnathambi Chetty* (3).

The appellant was not heard in reply.

The judgment of the Court was delivered by

Maclean C. J.—This is an appeal from a decree of the Subordinate Judge, Second Court, of 24-Pergunnas, dated the 2nd of February 1906.

The suit was one for partition. The plaint was filed on the 26th of August, 1898; and there were many defendants, amongst whom there were three minors who were represented in the suit by their mother as guardian. On the 15th of April 1898, upon the application of all parties and under an order of the Court, the matter in dispute was referred to arbitration. The award was filed in June 1899, and on the 19th of June in that year, a decree in accordance with the award was duly passed. In pursuance of that decree, the property has been partitioned. The original plaintiff died; the precise date of his death has not

(1) (1905) I. L. R. 28 All. 35.

(2) (1901) I. L. R. 29 Calo. 167 (181, 186); I. R. 29 I. A. 51.

(3) (1900) I. L. R. 24 Mad. 326.

been stated to us ; but it has been conceded by the respondents that he died shortly after the date of the decree. The present appellant is his heir and representative, and he was not substituted on the record until the 21st of December 1905, and he was so substituted on the application of the present respondents. On the 23rd of February 1905, an application for review was made by the present respondents, and that was rejected on the 13th of May 1905. On the 24th of May 1905, a second similar application was made ; that was rejected on the 15th of July 1905. The present appellant, although he had not been substituted on the record, was apparently before the Court on the last application.

On the 30th of August 1905, a third application was made for review. That was heard *ex parte*, and allowed on the 18th of November, 1905. It is, I think, quite clear upon the evidence, although the Subordinate Judge who dealt with the question of review found that the notices had been served upon the present appellant, that those notices had not been served in compliance with section 80 of the Code of Civil Procedure, and that in effect that order was made *ex parte*. The application of the 30th of August 1905 was successful. The review was granted, and the decree was set aside, and it was ordered that the entire suit should be tried *de novo*. On the 18th of December 1905, power was given to some of the defendants to file their written statements, and the case was put down for trial on the 2nd of February 1906. The present appellant did not appear, and the suit was dismissed for default. He now appeals from that decree.

It is clear that, having regard to the provisions of section 629 of the Code of Civil Procedure it is open to the appellant, on the appeal from the final decree, to take objection to the order passed on the application for review : and, he is now taking and making that objection. His first objection is that having regard to the language of Section 624, the Court had no jurisdiction to make this order. It is common ground that the Judge who made the order was not the judge who had delivered the judgment originally. Section 624 runs as follows : " Except upon the ground of the discovery of such new and important matter or evidence as aforesaid," which is not suggested in the present case, " or of some clerical error apparent on the face of the decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it." The ground upon which the review was

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granted was that the leave or assent of the Court had not been given on behalf of the minors to the matter being referred to arbitration, and, it is urged that, having regard to section 462 of the Code of Civil Procedure such leave was necessary. That was the view taken by the Subordinate Judge who acceded to the application, and he allowed the application for review on that ground. The first question then is whether the case falls within Section 624 ; the ground for allowing the review I have stated ; as to whether it is sound or not, I will say a word in a moment. It was certainly not upon the ground of the discovery of new and important matter or evidence, nor was it upon the ground of some clerical error apparent on the face of the decree. The language of the section is clear ; and, reading the language in its ordinary signification, it seems to me that the Judge had no jurisdiction, not being the same Judge who delivered the judgment, to grant the review. This is sufficient to dispose of the matter, apart from the question that the order on the review which was against the appellant, was passed behind his back. In this view, it is not necessary to express any final opinion as to whether the leave or consent of the Court to the application by all the parties to refer the matter to arbitration was necessary under section 462. The present inclination of my opinion is, having regard to the case of *Harden Sahai v. Gauri Shankar* (1), though I am not unmindful of the case of *Lakshmana Chetti v. Chinnathambi Chetti* (2), that such leave or consent was not necessary.

In these circumstances, the order of the 18th of November 1905, made on review, appears to me to have been made without jurisdiction, and it is open to the appellant in appealing from the final decree to raise this question.

The result, therefore, is that the appeal must be allowed, and the order on review, of the 18th of November 1905 must be discharged, and the appellant must have the costs of this appeal.

A. T. M.

Appeal allowed.

(1) (1905) I. L. R. 28 All. 35.

(2) (1900) I. L. R. 21 Mad 326.

Before Mr. Justice Rampini and Mr. Justice Mookerjee.

RABIA KHATUN AND OTHERS

v.

RANI BILASHMANI DEBI AND ANOTHER.*

Land Registration Act (VII of 1876), Secs 78—Registration during pendency of suit.

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April, 20.

If the name of a proprietor is registered under the Land Registration Act, during the pendency of a suit for rent by him, and the registration decree is produced in the course of the trial, it must be held that there is sufficient compliance with the requirements of the Act.

Appeal by the Plaintiffs.

Suit for rent.

The facts appear from the judgment.

Dr. Sarat Chander Banerjee (for M. Zahadul Rahim Zahud)
for the Appellants.

Babus Harendra Narain Mitra and Jogendra Chander Dutt
for the Respondents.

The judgment of the Court was delivered by

Rampini J.—This appeal arises out of a suit for rent, brought upon a *kabuliat*. The *kabuliat* was not executed in favour of the plaintiffs, but in favour of a predecessor of the plaintiffs. The plaintiffs are now in possession of the land, in respect of the ownership of which the *kabuliat* was granted. The rent sued for accrued for certain *khariya taluqs* and certain *shikmi taluqs*.

The lower appellate Court has given the plaintiffs a decree in respect of the *shikmi taluqs*, but has disallowed the claim in respect of the *khariya taluqs*, on the ground that the plaintiffs' names have not been registered as owners thereof, under the Land Registration Act, and that the registration decree produced in the course of the suit and before the grant of the final decree by the first Court is not sufficient to justify a decree for rent being passed in the plaintiffs' favour. Furthermore, the Subordinate Judge has held that the provisions of section 81 of the Land Registration Act do not save the bar arising under section 78 of the same Act, inasmuch as the *kabuliat* was not executed in favour of the plaintiffs, but in favour of one of their predecessors.

The plaintiffs appeal to us and contend that the Subordinate Judge is wrong upon both points.

* Appeal from Appellate Decree, No. 304 of 1905, against the decree of Babu Woopendra Chandra Ghose, Sub-Judge, Dacca, dated the 25th November 1904, modifying the decree of Babu Kali Kumar Sarkar, Munsiff, Dacca, dated the 31st July 1903.

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We think it is clear that the Subordinate Judge is wrong in holding that the registration decree produced before the final decree in the suit was given, is not sufficient to justify the plaintiffs getting a decree for rent. We think that the Subordinate Judge has misread the ruling in the case of *Alimuddin Khan v. Hira Lall Sen* (1), which has been followed in the cases of *Abul Khair v. Meher Ali* (2) and *Harehkrishna Das v. Brindabun Shaha* (3). We think it is clear from these rulings that if a registration decree is produced in the course of the trial of the suit, that is sufficient to justify a decree for the rent claimed being given to the plaintiffs. We find that the names of the plaintiffs Nos. 1, 2, 3 and 6 have been registered in respect of the shares held by the plaintiffs' predecessor. The names of the plaintiffs Nos. 4 and 5 have not been registered; but seeing that the names of the other four plaintiffs have been registered in respect of all the shares formerly held by their predecessor, we think that is sufficient to justify a decree being given.

In these circumstances, it is unnecessary to consider the second point raised, namely, as to whether the Subordinate Judge was right in saying that the written contract referred to under section 81 of the Land Registration Act must be a written contract between one of the parties to the suit and the predecessor of the other.

We accordingly decree this appeal with costs.

B. M.

Appeal decreed.

(1) (1895) 1 L. R. 23 Calc. 87.

(2) (1899) 1 L. R. 26 Calc. 712

(3) (1897) 1 C. W. N. 712.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

SYED SHAH NAJAMUDDIN HYDER

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SYED ZAHID HOSSEIN AND OTHERS.*

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*Malikana, claim for—The Land Registration Act (VII of 1870, B. C.) See 78—
Malikana, not rent.*

Section 78 of the Land Registration Act is no bar to a claim for *Malikana*, which is not a claim for rent.

Bhuli Sing v. Mussamat Nimu (1) followed.

* Appeal by Defendant No. 1.

Suit to realise *Malikana*.

* Appeal from Appellate Decree No. 1247 of 1906, against the decree C. W. E. Pittar, Esq., District Judge of Gaya, dated 10th March 1905, affirming that of Babu Pramatha Nath Chatterjee, Munsiff, Gaya, dated 1st March 1904.

(1) (1869) 4 B. L. R. 29.

The facts of the case and arguments appear sufficiently from the judgment.

Babus Umakali Mukerji and Lakshmi Narain Singh and Mouli Mahammad Mustafa Khan and Babu Satis Chandra Mukerji for the Appellant.

Mouli Syed Shamsul Huda and Nuruddin Ahmed for the Respondents.

The judgment of the Court was delivered by

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Mookerjee J.—Two points have been taken on behalf of the defendant appellant in this case, namely, *first*, that the claim for *Malikana* is not maintainable by reason of the provisions of Section 78 of the Land Registration Act, and *secondly*, that the *Malikana* ought not to have been calculated upon the gross income of the estate.

As regards the first point, it is clear that Section 78 of the Land Registration Act has no application, and does not bar this suit. That section provides that no person shall be bound to pay rent to any person claiming such rent as proprietor of an estate in respect of which he is required by the Act to cause his name to be registered, unless the name of such claimant shall have been registered under the Act. Under Section 3 Sub-Section (8), "proprietor" means every person in possession of an estate or of any interest in an estate as owner thereof, and under Sub-Section (2) "estate" includes any land subject to the payment of land revenue, either immediately or proximately, for the purpose of which separate engagement is entered into with Government. The learned vakil for the appellants contended that the result of these definitions is to make the person entitled to *Malikana* a proprietor within the meaning of the Act. But even if this be conceded in favour of the appellant, it does not follow that Section 78 is a bar to the present claim, because in order to bring the case within the terms of that section, it must be established that the sum claimed is rent. Now, as was pointed out by this Court in the case of *Bhuli Singh v. Mussamat Nimu Behu* (1), a claim for *Malikana* is in no sense a claim for rent. Sir Barnes Peacock C. J., observed that *Malikana* is not rent, nor has it the elements of rent, because it is a right to receive a portion of the profits of the estate for which the Government have made a settlement with another person, by reason of the neglect or failure of the real proprietor to come in and take a settlement. *Malikana*, therefore, is a right to receive something out of the collection of

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the estate, and is an interest in immovable property, but by no stretch of language, can *Malikana* be treated as rent. No doubt, in that case, the question arose with reference to the terms of Section 1 clause 12 of the Limitation Act of 1859 ; but there is no reason to hold that the term "rent" has a different meaning in Section 78 of the Land Registration Act from what it has in the Limitation Act of 1859. The first contention of the Appellant consequently fails.

As regards the second point taken on behalf of the appellant, it turns out, upon examination, to be really a question of fact. The judgment of the learned District Judge upon this point, may perhaps be open to criticism, as the origin of the *Malikana* which is now claimed has not been determined. The learned vakil for the appellant argued his case on the assumption that the claim was founded on Section 5 Sub-Section 2 of Regulation VII of 1822. The learned vakil for the respondents, on the other hand, suggested that the claim might be founded on contract independent of the Regulation. It is impossible, upon the findings as they now stand, to say with any approach to certainty what the precise nature of the *Malikana* claimed is. As, however, it is not denied that the plaintiffs are entitled to some *Malikana*, we think that the best course to adopt would be to maintain the decree made by the learned District Judge, but to leave open the question whether the *Malikana* is recoverable upon the gross income. We may add that in the Courts below also, it was not disputed that the respondents were entitled to some *Malikana*. The dispute really was as to the amount which they were entitled to recover and the principle upon which that amount ought to be assessed. In the present appeal, the same attitude has been maintained by the appellant, and it has not been contended for him that the respondents are not entitled to any *Malikana* at all.

With these observations, we dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

Before Mr. Justice Rampini and Mr. Justice Mookerjee.
NAFFAR CHANDER PAL CHOWDHURY AND ANOTHER

v.

MUNSHI MAHOMED KAYUN.*

Civil Procedure Code (Act XIV of 1882), Secs. 12 and 13—Res judicata—Rent, suit for—Mesne profits, suit for.

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A purchased a tenure at a sale for arrears of rent, and some time after, served a notice upon B, an under tenure-holder, under section 167 of the Bengal Tenancy Act. A then sued to eject B, and to recover mesne profits. The Court made a decree for ejectment and allowed mesne profits from the date of the service of notice under section 167. B preferred an appeal. During its pendency, A sued B for rent for the period between the date of his purchase and the date of the service of notice.

Held, (1) that the suit was not barred under section 12 of the Civil Procedure Code;

Raja Ranjit v. Bhagabutti (1) applied.

(2) that the suit was not barred under section 13, Civil Procedure Code, as A could not join claims for rent and mesne profits in the previous suit.

Appeal by the Plaintiffs.

Suit for rent.

The facts and arguments appear sufficiently from the judgment.

Babu Amarendra Nath Bose for the appellants.

No one for the respondent.

The judgment of the Court was delivered by

Rampini J.—This is an appeal against a decision of the District Judge of Nadia, dated the 8th December 1904.

The facts of the case are these. It appears that the plaintiffs purchased the defendant's tenure, which was sold under the provisions of the Bengal Tenancy Act. They then served notice on the defendant under sections 167 of that Act. The defendant, however, did not deliver up possession; and therefore the plaintiffs brought a suit for recovery of possession and for mesne profits. That suit was decreed; but it was held that the plaintiffs were entitled to mesne profits from the date of the service of notice on the defendant under section 167, and their claim for mesne profits from the date of the sale up to the date of the service of notice, that is, the 6th June 1901 was disallowed.

* Appeal from Appellate decree No 391 of 1905 against the decree of Mac-Blaine Esq., District Judge, Nadia, dated the 8th December 1904, affirming that of Babu Hem Chandra Mukerji, Munsiff, Krishnagore, dated the 12th August 1904.

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The plaintiffs now bring this suit, claiming rent for the period for which their claim for mesne profits has been disallowed in the previous suit.

The District Judge has held that the suit is barred by sections 12 and 13 of the Code of Civil Procedure. He has held that it is barred by section 12 because the defendant in the previous suit had appealed to this Court and that appeal was still pending. He has held that the suit is barred by section 13, because the plaintiffs, he says, are now suing for exactly the same sum of money as in the previous suit, only now they are claiming it as rent, instead of mesne profits, and he adds that the plaintiffs are seeking by the device of altering a name to re-open a question previously decided as between them and the defendant.

In our opinion the learned District Judge is wrong upon both points. In the case of *Raja Ranajit Singha v. Bhagabutti Charan Roy* (1), it has been held that section 12 of the Code of Civil Procedure is no bar to the maintainability of two suits at the same time under circumstances similar to those of the present case. But, however that may be, it is clear that section 12 is not a bar to the present suit, seeing that the defendant's appeal has now been disposed of in favour of the plaintiffs.

Then, we do not think that section 13 bars the suit, because the plaintiffs claimed mesne profits from the defendant for the period during which they were held to be not entitled, seeing that it was found in that suit that their claim for mesne profits had only accrued from the date on which the defendant's *patni* tenure was annulled. The plaintiffs could not well claim rent from the defendant in that suit, because it was not until the disposal of that suit that they saw that they were entitled to obtain rent; and they could not have sued for both rent and mesne profits in the same suit, because such claims arise out of different causes of action.

In our opinion, the plaintiffs are entitled to rent from the period between the 10th July 1900 and the 6th June 1901, because it is clear from the decision in the previous suit that during that period the defendant was the plaintiffs' tenant. His *putni* tenure was not annulled until the date of the service of notice upon him; and during the previous period he cannot have been a trespasser, but must have been a tenant of the plaintiffs and the plaintiffs are entitled to rent from him.

We therefore decree this appeal with costs, and remand the case to the lower appellate Court to ascertain the amount of rent to which the plaintiffs are entitled.

B. M.

Appeal decreed.

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CIVIL RULE.

Before Mr. Justice Harington and Mr. Justice Mookerjee.

BABURAM MANDAR

v.

RAM SAHAJ SAHOO.*

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1905.

February, 2.

Civil Procedure Code (Act XIV of 1882), Sec. 310A. Beneficial owner, if entitled to apply—'Person whose property has been sold.'

A beneficial owner is entitled to apply under section 310A for the setting aside of a sale in execution of a decree for money against the *benamidar*. He is a person whose property has been sold under the decree.

Ram Chandra Dhondo v. Rakhmabai (1), *Arjun Mollah v. Jadunath Roy* (2), *Erode v. Pratheer* (3), *Abdul Gani v. A. M. Dunne* (4) distinguished.

Bani v. Ramkrishna (5) followed.

Rule obtained by the Claimant.

Sale in execution of a decree for money.

The material facts and arguments appear from the judgment *Babu Digambar Chatterji* for the Petitioner.

Babu Sahigram Singh and Moulaie Muhammad Tahur for the Opposite Party.

The judgment of the Court was delivered by

Mookerjee J.—This is a Rule calling upon the opposite party to show cause why the order of the Subordinate Judge should not be set aside on the ground that as the petitioner claims to be a beneficial owner of the property sold, the lower Court was not justified in law in rejecting his application to make the deposit under section 310A of the Code of Civil Procedure.

It appears that in execution of a decree obtained by one Ramsahai Sahoo against Peary Singh, mouzah Bishenpore was sold on the 25th May 1904. On the 21st June following, the

* Civil Rule No. 3663 of 1904 against the decision of Babu Mati Lal Haldar, Subordinate Judge of Monghyr.

(1) (1898) 1. L. R. 23 Bom. 450.

(3) (1902) 1. L. R. 26 Mad. 365.

(2) (1902) 7 C. W. N. 243.

(4) (1892) 1. L. R. 20 Calc 418.

(5) (1896) 1 C. W. N. 135.

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present petitioner made an application to deposit the decretal money with the required compensation and costs under section 310A, on the ground that although the property in question stood in the name of the judgment-debtor, the applicant was the person beneficially interested in it.

The learned Subordinate Judge in the Court below has rejected the application without any investigation as to the title set up by the petitioner, on the ground that the petitioner was not competent to make the application under section 310A. Civil Procedure Code. Section 310 A provides that "any person whose immovable property has been sold under this Chapter, may at any time within one month apply to have the sale set aside" on his fulfilling the conditions mentioned in that section.

It has been contended before us by the learned vakil for the petitioner that he is the person whose immovable property has been sold, and that consequently he is competent to make the application under section 310 A ; and in support of this contention, he has placed reliance upon the case of *Abdul Gani v. A. M. Dunne* (1).

On the other hand, it has been argued by the learned vakil who appears to show cause, that inasmuch as the sale was in execution of a decree for money against the judgment-debtor, all that has passed at the execution sale is the right, title and interest of the judgment-debtor, that consequently upon the case made by the petitioner himself his interest in the property has not been affected, and that therefore he is not the person whose immovable property has been sold within the meaning of section 310 A. The learned vakil for the opposite party has referred to the case of *Ramchandra Dhondo v. Rakhmabai* (2) as an authority for the proposition that a person who has purchased a property which is afterwards sold in execution of a decree obtained against the vendor, is not entitled under section 310 A of the Code of Civil Procedure to have the execution sale set aside ; and the same view of the law appears to be borne out by the cases of *Arjan Mollah v. Jadu Nath Roy* (3) and *Erode Manikkoth Krishnan Nair v. Puthiedeth Chembakkoseri* (4). But we are of opinion that the cases relied upon are distinguishable, and do not help the contention of the learned vakil who appears to show cause. We are also of opinion that the case relied upon by the vakeel for the petitioner, namely, the case of *Abdul Gani v. A. M. Dunne* (1) is distinguish-

(1) (1892) I. L. R. 20 Calo. 418.

(2) (1898) I. L. R. 23 Bom. 450.

(3) (1902) 7 C. W. N. 243.

(4) (1902) I. L. R. 26 Mad. 365.

able. That was a case in which the sale took place in execution of a decree for arrears of rent. It was held by this Court that where immovable property had been sold in execution of a decree against the ostensible owner as his property, under circumstances which make the sale binding upon the beneficial owner, such beneficial owner is entitled to come in under section 311 of the Code of Civil Procedure to have the sale set aside. That decision is based on the ground that the beneficial owner, who is bound by the sale is a person whose immovable property has been sold within the meaning of section 311 of the Code of Civil Procedure. In the present case, the sale has taken place in execution of a decree for money, and therefore, it cannot be said that the case of *Abdul Gam v. A. M. Dunne* (1), is precisely in point.

The case, however, which comes nearest to the present one is the case of *Busi Poddar v. Ram Krishna Poddar* (2), in which it was held by this court that the *benamdar* of a person whose immovable property is sold, is entitled to apply to have the sale set aside under section 310A of the Code of Civil Procedure. The learned Judges after pointing out that "the language of section 310A ought not to receive a too literal interpretation," went on to observe, "there is no question in the present case between the true owner of the property and the *benamdar*, nor would the setting aside of the sale at the instance of the latter prejudicially affect the title of the true owner. It is moreover immaterial to the other parties concerned whether the payments for which the section provides are made by one or by the other. The power of the *benamdar* to affect the property which he holds *benami* is recognised for many purposes. He may under certain conditions confer a good title on a purchaser and the true owner may be bound through his medium in other ways." These are observations which, it appears to us, are clearly applicable to the present case. No doubt, the sale has taken place in execution of a decree for money. *Prima facie*, all that has passed in execution is the right, title and interest of the judgment-debtor. But, nevertheless, if the beneficial owner subsequently seeks to recover the property on the ground that his interest has not been affected by the execution sale, he may be met, and, under certain circumstances, successfully met by a defence on the part of the purchaser, based on the doctrine of estoppel. Under such circumstances, it would be impossible to

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say that the beneficial owner is not the person whose immovable property has been sold within the meaning of section 310A.

We must hold, accordingly, that the view taken by the Court below that the applicant is a person who has no *locus standi* to come under section 310A is not well-founded on principle. The order of the lower Court must therefore be set aside, and the case remitted to it in order that it may investigate whether the applicant has a beneficial interest in the property. This course is in accordance with that followed by this Court in the case of *Janardhan Ganguli v. Kali Kristo Thakur* (1), where the learned Judges pointed out that if an application be made by a person under section 310A of the Code of Civil Procedure, on the allegation that he has an interest in the property sold, and if such allegation is challenged either by the decree-holder or by the auction-purchaser, the question must be determined by the Court upon evidence.

The Rule, therefore, must be made absolute with costs; we assess the hearing-fee at two gold mohurs

N. K. R.

Rule made absolute.

(1) (1895) I. L. R. 23 Calc. 393

Before Mr Justice Harington and Mr. Justice Mookerjee.

MUSSAMUT KARIMAN

v.

A. H. FORBES.*

CIVIL.

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February, 27.

Civil Procedure Code (Act XIV of 1882), Secs 108, 591—Rule discharged by High Court—District Judge—Power to re-open question—Order setting aside ex parte decree—Appeal, if open to attack in—Petition to High Court—Facts in judgment—Affidavit, if necessary.

An *ex parte* decree was set aside under section 108 of the Code of Civil Procedure by the Munsiff. A rule to set aside this order was discharged by the High Court. Subsequently on appeal from the final decree, the District Judge set it aside on the ground that the order under section 108 was not proper

Held, the District Judge had no jurisdiction to consider the propriety of the order, after the discharge of the rule by the High Court

Held further—It was not open to the plaintiff to challenge the validity of the order in an appeal against the final decree. Section 591 of the Code of Civil Procedure, has no application to such a case.

Chintamani v. Raghoonath (1) and *Tasaddug v. Hayatunnissa* (2) followed.

Per Mookerjee J.—Where the facts in a petition to the High Court appear sufficiently from the judgments of the lower Courts, no affidavit need be filed

Zamiran v. Fateh Ali (3) followed.

* Civil Rule No. 3909 of 1904 against the decision of Rabu Rajendra Kumar Bose, District Judge of Purneah, dated the 3rd September 1904.

(1) (1895) I. L. R. 22 Calc. 981.

(2) (1903) I. L. R. 25 All. 280.

(3) (1904) I. L. R. 32 Calc. 146.

Rule obtained by the Plaintiff.

Suit for rent.

The material facts and arguments appear from the judgments.

Moulvie Sowghat Ali for the Petitioner.

Babu Jey Gopal Ghosh for the Opposite Party.

The following judgments were delivered :—

Harington J.—In this case a rule was issued calling on the opposite party to show cause why the judgment of the District Judge complained against should not be set aside on the ground that he had no jurisdiction in the matter raised before him.

In this case, the plaintiff had succeeded many years ago in obtaining an *ex parte* decree in a rent suit brought against the defendant. The defendant subsequently applied to the Munsiff and obtained an order setting aside the *ex parte* decree and restoring the suit for trial.

The plaintiff obtained a rule from this Court calling upon the defendant to show cause why that order restoring the case should not be set aside, and when that rule came on for hearing, it was discharged by a Division Bench of this Court who declined to interfere. The case was reheard. A decree was passed by the Munsiff. The plaintiff appealed to the District Judge and his appeal was successful.

The District Judge held that the order made by the Munsiff setting aside the *ex parte* decree and restoring the case for trial was one which the Munsiff had no jurisdiction to make, and on that ground, he set aside the decree of the Munsiff made at the rehearing of the suit, and restored the original *ex parte* decree. In my opinion, even if it were open to the District Judge to question at the appeal the propriety of the order restoring the case for trial, (and I think it was not so open), he would at any rate be concluded by the Judgment of this Court on the hearing of the rule.

The only ground on which the Munsiff's order could be questioned in this Court under Section 622, was that the Munsiff had acted without jurisdiction in restoring the suit, or had acted in the exercise of his jurisdiction with material irregularity in making the order which he did. The Court, it is true, in its judgment does not express with precision a view on the question of jurisdiction, but inasmuch as the Court has refused to discharge the Munsiff's order, it is clear the Court was not satisfied that it was made without jurisdiction. That being so, I think, the District Judge was not entitled to say that the whole of the

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rehearing of the case before the Munsiff is a nullity, because he had no right to restore the case for a rehearing. I also think, that with regard to the other point which has been argued before us, that even if it had not been for the judgment of the High Court in the hearing of the rule, still under Section 591, the alleged irregularity of the order restoring the case would not have been a matter affecting the decision of the case, and so a matter which was open to the District Judge under Section 591.

For these reasons, the rule will be made absolute, and the case remanded to the learned District Judge that he may hear the case on the merits

The petitioner will get his costs two gold mohurs.

Mookerjee J.—I agree with my learned brother that this rule must be made absolute and the order of the Court below discharged. Apart from the question as to whether the order of the High Court on the previous occasion precluded the District Judge from entertaining the point which was raised before him, it is quite clear that it was not open to the plaintiff to challenge the validity of the order passed under Section 108 of the Code of Civil Procedure in an appeal preferred against the final decree made in the suit after it had been restored

The learned vakil who has appeared to show cause in this Court has relied upon the provisions of section 591 of the Code of Civil Procedure which lays down that "if any decree be appealed against, any error, defect or irregularity in any such order," (that is to say, an order against which no appeal is allowed under Ch. 43 of the Code) affecting "the decision of the case, may be set forth as a ground of objection in the memorandum of appeal." It seems to me to be obvious that an order setting aside an *ex parte* decree under section 108 of the Code of Civil Procedure cannot be regarded as an order affecting the decision of the case within the meaning of section 591 of the Code. This view is supported by the decision of this Court in the case of *Chintamony Dass v. Raghonath Sahoo*. (1) In that case, Mr. Justice Pigot pointed out that "the object of section 108 is to ensure that the defendant shall get a hearing, notwithstanding that he did not appear when the case was called on, if he had not been served with summons, or was prevented by sufficient cause from appearing. The first object and purpose for which Courts sit is, of course, that the parties shall be heard; the object of section 108

is to ensure, within reasonable limits as to public convenience, that every defendant shall have a hearing. An order under section 108 is not appealable under section 588. Unless an order under that section is appealable by reason of its being an order affecting the decision of the case, it is not appealable under section 591. Now, in one sense, it affects the decision of the case, because it ensures a decision upon the merits and sets aside a decision which has not been obtained upon the merits, but we cannot think that that can be an 'affecting' within the meaning of the words 'affecting the decision of the case.' We think that the words 'affecting the decision of the case' must be taken to mean 'affecting the decision of the case with reference to the merits of it,' and that an order under section 108, which merely ensures a hearing upon the merits, can not be considered to be an order 'affecting the decision of the case' under section 591." In this view of the scope of section 591 I entirely agree, and I find that it has been accepted as good law by the High Court at Allahabad in the case of *Tasadduq Husain v. Hayat-un-nissa* (1). In that case Sir John Stanley points out that "the intention of the Legislature was that an order setting aside an *ex parte* decree should be final," and that by no stretch of language can an order under section 108 be regarded as an order affecting the decision of the case on the merits. It is clear, therefore, upon these authorities as well as upon principle that it was not open to the plaintiff to challenge the validity of the order under section 108 in the appeal which he preferred against the decree made by the Court of first instance after the case had been restored.

It has been suggested by the learned vakil who appears to show cause that assuming that the decree made by the learned District Judge is erroneous, it is not competent to this Court to interfere under section 622 of the Code of Civil Procedure, inasmuch as that decree is founded merely upon an erroneous view of the law. I am unable to accede to this contention. No doubt, the learned District Judge has committed an error of law in construing section 591 of the Code of Civil Procedure as conferring jurisdiction upon him to examine the validity of the order passed under section 108; but if a subordinate Court, by reason of an erroneous view of the law, assumes a jurisdiction which it does not possess, it is competent to this Court to interfere under the provisions of section 622 of the Code of Civil Procedure. It was also suggested by the

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learned vakil who appears to show cause, that this Rule ought not to be heard, inasmuch as the petition upon which it had been obtained is not supported by any affidavit. I do not think that this contention ought to prevail, for, as pointed out by this Court in the case of *Zamiran v. Fatch Ali* (1), "when a petition to the High Court states facts which are matters of record and which are supported by copies of the order passed by the Court below, such a petition need not be supported by an affidavit." The facts upon which the petition to this Court was made, appear from the judgment of the learned District Judge, and it was not necessary, therefore, for the petitioner to put in any affidavit in support of this application.

N. K. B.

Rule made absolute.

(1) (1904) I. L. R. 32 Calc. 116.

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

NARSINGH PRASAD SINGH AND OTHERS

v.

THE KING EMPEROR.*

CRIMINAL,

1908.

June, 10, 22.

Workman's Breach of Contract Act (XIII of 1859)—Residence of master or complainant—Outside Presidency Towns—Expiry of term of contract—Enforcing contract—Return of money advanced—Punishment for non-return.

The provisions of the Workman's Breach of Contract Act apply to areas to which the Act has been extended by section 5, and this notwithstanding that the master or complainant may not reside or carry on business in a Presidency Town.

Held further (Stephen J. *dubitante*).—The remedies under section 2 of the Act are interlocked and interdependent. If one has lapsed, the other has lapsed also. The master has the option of enforcing the return of the money advanced or the performance of the contract. If the option has become impossible by the expiry of the term, the Magistrate's jurisdiction is gone.

Khoda Buksh v. Moti Lal (1) followed.

Rule obtained by the artificer.

Case for breach of contract as a workman.

The facts and arguments appear sufficiently from the judgments.

* Criminal Revision No. 75 of 1908 for questioning proceedings pending before Babu Nanda Lal Bagchi, Deputy Magistrate of 24-Pergunnahs.

(1) (1906) 11 C. W. N. 246.

Mr. Huq and Babu Atulya Charan Bose for the Petitioner.

Mr. A. Chaudhuri and Babu Tarak Chandra Chakravarti
for the Complainant.

C. A. V.

The following judgments were delivered :

Stephen J.—The petitioners are alleged to have entered into a contract at or near Patna with one Narangi Persad to work for him at certain brick fields in the neighbourhood of Calcutta, for a period ending on the 31st of May, now passed. It is said they received an advance of money on account of the work that they contracted to perform, and subsequently wilfully and without lawful or reasonable excuse refused to perform it. A complaint was accordingly made against them by Narangi Persad under section 1 of Act XIII of 1859 on the 5th of March 1908, and the case was transferred to a Deputy Magistrate who made an order against one of the persons charged with which we are not at present concerned. A rule has now been granted calling on the District Magistrate of the 24 Parganas to show cause why the proceedings against the other persons who contracted to serve Narangi Persad should not be quashed as being without jurisdiction. The Magistrate considers that there is no objection to the jurisdiction of the trying Court, but also offers no objection to the proceedings being quashed, as he considers it probable that the case has been falsely instituted at the instance of the petitioners zeminders. We have however heard counsel on behalf of the complainant, which I consider was correct procedure as the present proceedings are in fact undertaken to enforce his civil right.

The argument in favour of the rule, to show that the Magistrate has no jurisdiction is twofold. That which goes the more to the root of the matter is that as the complainant does not reside or carry on business in a Presidency Town, he cannot claim any remedy under the Act. An argument of more restricted scope is that as the term of the contract has now expired, the complainant's remedy is gone.

The first argument may be stated thus. The Act confers on certain persons, namely masters and employers residing or carrying on business in any Presidency Town, the privilege of enforcing their civil rights by a penal remedy enforceable by criminal procedure. The workman or the place where he contracts to do his work, may be anywhere, but the remedy is to be sought from a Magistrate of Police, which means a Presidency Magistrate.

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When the Act is extended by section 5, the only effect of the extension is to enable officers specially appointed to exercise the functions of a Magistrate of Police, and the privilege of person residing or carrying on business in Presidency Towns is not extended to any one else. I cannot agree with this argument. The curious effect attributed, and as it seems to me rightly attributed to the Act, in enabling a Presidency Magistrate to enforce a contract made and to be performed anywhere in British India, no doubt lends some colour to the suggestion that the extension of the Act has no effect except to provide for its enforcement at or near the place where it was made, or is to be performed. But had this been the intention of the Legislature, I do not think they would have mentioned the extension of the Act. Also, I consider that the language of section 5 shows that the extension of the Act means the extension of the whole Act, that such extension is something more than merely conferring certain powers on the officers mentioned, and that giving them those powers is merely ancillary to something else. If this is so, the only other effect that the extension can produce is to confer on persons residing and carrying on business in the area to which the Act is extended the privilege conferred by the Act on persons similarly situated in regard to the Presidency Towns.

That a practice has been followed for nearly fifty years is no proof that it is legal. But when we find that the Act has been extended to all the Collectorates in the Bombay Presidency, to all the Districts of Madras, to the Town and Cantonment of Rangoon, and to the tea Districts of Assam and Darjeeling, it is impossible to suppose that the privileges it confers were not intended to be exercised, and were not in fact exercised, by persons who resided or carried on business in those places and did not do so in a Presidency Town. And I cannot find in the numerous reports of cases that have arisen under this Act that the exercise of such a privilege has ever been challenged. Consequently, I am of opinion that a master or employer residing or carrying on business in a place to which the Act is extended has the same rights as are conferred by the Act on masters or employers resident or carrying on business in any Presidency Town, and that the first ground I have mentioned on which we are asked to make this rule absolute fails.

As to the second argument in support of the rule, apart from authority, I cannot regard it as sound. It was long ago decided in this Court that the Magistrate cannot order the

workman to perform his work after the term of the contract has expired, *In re Chikka Pulla* (1) and *In re Matha Goundan* (2), and the same view was recently taken by this Court in *Khoda Buksh v. Moti Lal Jahari* (3). The reason for this I suppose to be that after the term of the contract is expired, the workman cannot perform his contract "according to the terms of his contract." But I can not see why the expiration of the term of the contract should deprive the complainant of his right to exercise his option of asking for the recovery of the money he advanced. The option between the two remedies is that of the complainant, and not of the person complained against, and the fact that one remedy would be infructuous, does not seem to me to deprive him of the other. I consider that the complainant's right to recover the money he has advanced continues till it is repaid to him, subject to the effect of the Limitation Act of which there is no question here. This seems to me to be so, particularly when, as is the case here, the complainant instituted proceedings at a time when both remedies were open to him, and it is only this rule that has prevented him from exercising his option. This view is in agreement with that of the Madras High Court in *Queen Empress v. Konda* (4), but the decision in the *Khoda Buksh v. Moti Lal* (3) seems to me to be a direct authority the other way. It is there laid down that where the term of the contract has expired, "the contract cannot be specifically enforced" or "the money recovered." I must respectfully dissent from this view, but I do not consider the decision as *obiter*. Owing to the view taken by my learned brother, the case cannot be referred to a Full Bench, and I have therefore no choice but to follow this decision. I therefore agree that the rule must be made absolute.

Holmwood J.—I think this rule should be made absolute. It is unnecessary to recapitulate the facts which are sufficiently set out in the judgment of my learned brother.

In my opinion the remedies under section 2 Act XIII of 1859 are interlocked and interdependent, and if one has lapsed, the other has lapsed also.

This is the view that was taken by this Court (Mitra J. and myself) in the case of *Khoda Buksh v. Moti Lal Jahari* (3), to which I was a party. The law has, it is true, been much more

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(1) (1884) Weir's reports C. R. No. 777—83 p. 470.

(2) (1884) Weir's Rep. C. R. No. 779—83 p. 471.

(3) (1906) 11 C. W. N. 247.

(4) (1893) I. L. R. 16 Mad. 347.

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stringently interpreted in Madras, Bombay and Allahabad, but I prefer to follow the spirit of the rulings of this Court.

The offence created by the Act is not the neglect or refusal of the workman to perform his contract, but the failure on his part to comply with an order made by the Magistrate directing the workman to repay the money advanced or perform the contract. *King Emperor v. Takasi Nukayya* (1). The complainant has the option of repudiating the contract and getting the money back, or of keeping to the contract and getting the work done. Imprisonment is imposed as the punishment for refusing either of these remedies, but no fine or imprisonment is provided as a punishment after the contract has been broken and expired. The option being the return of money advanced, or the performance of the contract while it is still running, it seems to me that the Magistrate's jurisdiction is gone if the option has become impossible. The complainant must exercise that option within the time the contract is running. He cannot come after the contract has expired and say, "now I have no option but I want my money back." The very fact that he has no option throws him on his ordinary civil remedy.

As regards the enforcing of the remedy, if it has been duly sought within the time before the contract has expired, I do not think any hard and fast rule can be laid down, but as to the exercise of the option I am clear and the circumstances of this case fully bear me out.

In the case that has been tried out and which forms the subject of another rule, the option chosen by the complainant was that the work should be completed, but now that the time has expired in the other cases, the complainant merely wants his money back or rather wants to punish the accused with imprisonment for failing to return the money. The Magistrate of the District in showing cause for the Crown considers that the case is a more than doubtful one and recommends the quashing of the proceedings. We heard the learned counsel for the complainant very fully, and the impression left on my mind was that these cases are now being pursued to secure the punishment of the accused and not to secure the legal remedies under the Act.

There is ample authority for holding that the enforcement of the contract cannot be asked for after the time fixed has expired. Vide Weir 470, 471 and 473 and the *dictum* in 11 Calcutta Weekly Notes extending this doctrine to the recovery of the money has my fullest concurrence.

(1) (1901) I. L. R. 24 Mad. 660.

It was pressed upon us by learned counsel for the applicants for revision that the extension of the Act by a Notification under section 5 does not extend the place of residence of the complainant which is fixed by the Statute within the Presidency Town and the limits of a Presidency Town cannot be extended by extending the Act. But it appears that this Act has as a matter of fact been working in Bombay, Madras, Assam and elsewhere throughout the Districts for many years without objection, and however sound this technical objection may be as a question of drafting, it is too late to raise it now. The doctrine of *Factum Valet* appears to apply, and the ordinary rules for the interpretation of Statutes also seem to favour the contention that the extension of the Act extends all its incidents, even though in terms the extension of the residence of complainants is impossible.

But, for the reasons I have already given, I am of opinion that these rules should be made absolute and further proceedings dropped.

N. K. B.

Rules made absolute proceedings quashed.

APPELLATE CRIMINAL.

Before Mr Justice Brett and Mr Justice Ryves

RAM PRASAD MAITY

v.

THE EMPEROR *

Penal Code (Act XLV of 1860), Sec. 471—Dishonestly or fraudulently using as genuine a forged document—Dishonest or fraudulent intention—Receipt for documents actually found—Forgery.

Accused was charged with having fraudulently or dishonestly used a document which purported to be a receipt granted to him by the manager of a Ward's Estate for certain papers, and which receipt was alleged to be false. Subsequently, some of the papers mentioned in the receipt were on search found in the estate office, while the other papers had not been searched for.

Held, that these facts were not sufficient to show that user of the document was fraudulent or dishonest or that the accused had committed any offence.

Held further: If the papers had actually been deposited in the office and the accused had subsequently prepared a false receipt for them, it would not be forgery.

Appeal by the Accused.

Conviction under section 471, Indian Penal Code.

* Appeal No. 339 of 1908 against the decision of E. E. Forrester Esq., Sessions Judge of Midnapore disagreeing with the assessors, dated the 31st March 1908.

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1908.

Narsing Prasad
Singh

The King Emperor.

Holmwood, J.

CRIMINAL.

1908.

July, 14.

CRIMINAL.

1908.

Ram Prosad Maity

v.

The Emperor.

The facts appear from the judgment.

Babu Dasarathi Sanyal for the Appellant.

Babu Srish Chunder Chowdhury for the Crown.

The following judgment was delivered :

The present appellant has been convicted under Section 471 of the Indian Penal Code of fraudulently and dishonestly using as genuine a forged document knowing it to be forged, and has been sentenced to rigorous imprisonment for one year under that section.

Both the assessors were of opinion that the appellant was not guilty, but the Sessions Judge disagreeing with them found the appellant to be guilty and convicted him and sentenced him as already stated.

The document in respect of which the offence is said to have been committed is a receipt for certain papers which the appellant is said to have produced before the manager of the estate of Gopendra Nandan Das Mohapatra after that estate had been taken over by the Collector under the Court of Wards. The receipt purported to be a receipt given to the appellant by the proprietor of the estate, Gopendra Nandan Das Mohapatra, for certain papers which the present appellant had to deliver over as Amin or Tehsildar of the estate.

It appears that after the Court of Wards had taken over the estate, there was some delay on the part of the appellant in complying with the request of the manager to hand over the papers and, that in the end the accused put in the receipt which is alleged to be false. To prove that the receipt was a forged receipt, the evidence of the proprietor Gopendra Nandan Das Mohapatra taken before the Magistrate, was put in and received in the Sessions Court. That witness certainly denied that he had given any receipt for any papers to the appellant, but his denial is considerably discounted by the fact that in the end of the evidence he said that his memory had become somewhat dim owing to old age and illness, and that "he would not be able to give in detail an account of what he did on the day before yesterday." No other witness was produced to prove definitely that the receipt which the present appellant produced was not a genuine receipt which he had received from the proprietor. The receipt as we have already stated was for certain papers which it was alleged the accused had failed to deposit in the office of the estate and which he had failed to deliver over to the manager on demand. The manager after receiving the receipt from the appellant and

apparently after taking the statement of the proprietor came to the conclusion that the receipt was a false receipt, and he took the sanction of the Collector on behalf of the Court of Wards to prosecute the present appellant for forgery and for using as genuine the forged document. After, however, the sanction of the Collector had been given to the prosecution of the appellant, a search for the papers appears to have been made in the office of the estate, and from the judgment of the learned Sessions Judge it appears that some of the documents referred to in the receipt produced by the present appellant, were found in the office. The manager appears to have said that after he had heard that certain documents had been discovered, he stopped the search and did not think it necessary to ascertain whether in fact the other documents referred to in the receipt had been made over to the office. The learned Sessions Judge appears to hold that on the facts found the offence of using fraudulently and dishonestly as genuine, a forged document, was proved. We are unable to take that view. In this case, in order to support the charge against the appellant, the prosecution had to prove in the first instance that the document, (the receipt), was a forged document and not merely that it was a false document. It was therefore necessary for the prosecution to prove that the appellant had made the document or that the document had been made by somebody else with one of the intentions stated in Section 463, Indian Penal Code; so far as we can gather from the judgment of the lower Court, no attempt was made to prove that the receipt, if false, was made with any of the intentions stated in that section.

Further, in order to support the charge under Section 471, Indian Penal Code, it was essential for the prosecution to prove that the use of the receipt was fraudulent or dishonest. In this case, the prosecution does not appear to have made any substantial attempt to prove that in using the document, supposing it to be a false document, the accused had any fraudulent or dishonest intention. The evidence for the prosecution, we have already mentioned, fails to prove that the papers referred to in the receipt had not been all received in the office of the estate, and that being so, the prosecution have in the first instance failed to prove any dishonest or fraudulent object for which the appellant is said to have made use of the document. If in fact all the papers referred to in the receipt had been deposited by the appellant in the office of the estate, and if afterwards he preferred a false

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receipt acknowledging on the part of the landlord or proprietor the receipt of those documents, that would not amount to forgery, nor would the use of that document amount to fraudulently or dishonestly using a forged document, as it would be clear that the documents having in fact been deposited in the office, the appellant could have had no fraudulent or dishonest intention.

In this case we are of opinion that the prosecution has failed to prove the facts necessary to support the conviction against the accused.

We therefore set aside the conviction and sentence and acquit him and direct that he be discharged.

N. K. B.

Conviction set aside ; Accused acquitted.

CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

ISWAR CHANDRA GHOSHAL

v.

THE EMPEROR.*

CRIMINAL,
 1908,
 July, 25.

Penal Code (Act XLV of 1860), Sec. 175—Intentionally omitting to produce a document—Accused person—Incriminating document—Liability to produce—Criminal Procedure Code (Act V of 1898), Sec. 94.

An accused person cannot be called upon, under section 94 of the Criminal Procedure Code, to produce a document which would incriminate himself. His failure to do so is not an offence under section 175 of the Indian Penal Code.

Rule obtained by the Accused.

Conviction under section 175 of the Indian Penal Code.

The material facts and arguments appear from the judgment.
Babu Jyoti Prasad Sarvadhikari for the Petitioner.

The judgment of the Court was delivered by

Brett J.—No body appearing to oppose this Rule, we think it must be made absolute.

It appears that the accused while on trial for offences under sections 471 and 193 of the Indian Penal Code was directed to produce a certain rent receipt which had been filed in a civil suit by him or on his behalf and which had been returned. The document was not produced, and in consequence the prosecution against the accused for offences under sections 193 and 471, Indian Penal Code, was abandoned and the accused was discharged, as in the absence of the receipt there were no materials on which

* Criminal Revision Case No. 748 of 1908, against the order of Moulvi Yusuf Ali, Deputy Magistrate of Purulia, dated the 16th June 1908.

to prove the charges against him. Thereafter, the case in respect of which the present Rule was issued was instituted against the accused under section 175 of the Indian Penal Code for intentionally omitting to produce the receipt which he was legally bound to produce. The defence of the accused was that he had handed over the receipt to his muktear to produce it in Court-but the muktear had suddenly died and the receipt could not be found. This story was disbelieved and the Magistrate convicted the accused of an offence under section 175, Indian Penal Code, and sentenced him to two months' simple imprisonment.

This Rule was subsequently obtained by the present petitioner, the accused, calling upon the Deputy Commissioner to show cause why the conviction and sentence passed on the petitioner under section 175, Indian Penal Code, should not be set aside on the ground that the Deputy Magistrate erred in law in convicting the petitioner under section 175, and that upon the facts proved, the conviction was not warranted by law.

In our opinion the conviction cannot stand. The provisions of section 94, Criminal Procedure Code, cannot be taken to apply to the case of an accused person on his trial to whom a notice has been issued to produce an incriminating document.

The learned vakil who has appeared to support this Rule contends that to hold otherwise would be to go contrary to the principles laid down in the Code of Criminal Procedure, in sections 342 and 343 amongst others. We think the contention is sound, and are of opinion that the omission on the part of the accused, the present petitioner, to produce the document, supposing that there was such an omission, was not an act sufficient to constitute an offence punishable under section 175, Indian Penal Code.

We, therefore, make the Rule absolute, set aside the conviction and sentence passed on the present petitioner, and acquit him, and direct that he be discharged.

N. K. B.

Rule made absolute : Accused acquitted.

CRIMINAL.

1908.

Iswar Chandra
Ghoshal

v.
The Emperor.

Brett, J.

APPELLATE CIVIL.

*Before Sir Francis W. Maclean, K. C. I. E., Chief Justice and
Mr. Justice Doss.*

JOGENDRA NATH ROY AND OTHERS

v.

KRISHNA PRAMADA DASÍ AND OTHERS.*

CIVIL.

1906.

April, 3, 0.

Bengal Tenancy Act (VIII of 1885), Chap. X—Record of rights—Alteration of entries—Regular suit, maintainability of—Special procedure—Secs. 106, 108.

No regular suit can be maintained for the alteration and correction of entries in a record of rights. The special procedure in sections 106, 108 of the Bengal Tenancy Act must be followed.

Appeal by the plaintiffs.

Suit for correction and alteration of entries in a record of rights.

The material facts and arguments appear from the judgments.
Babu Surendra Chandra Sen for the Appellants.

Dr. Rash Behary Ghose, Babus Provash Chandra Mitter and Atul Chunder Dutt for the Respondents.

The following judgments were delivered :

Maclean C. J.—This is a suit for the alteration and correction of certain entries made in the record of rights published under Chapter X of the Bengal Tenancy Act. The real question is, whether the plaintiffs are entitled to maintain the suit. Both the Munsiff and the Subordinate Judge have held that the suit is not maintainable, and that the plaintiffs should have pursued the special remedy which is given them either under section 106 or under section 108 of the Bengal Tenancy Act. They have not done so.

It appears that at the instance of defendant No. 1 a survey was made and a record of rights prepared by a duly appointed Settlement Officer, in respect of all lands situated in village Sarulia. In the course of the settlement proceedings, the plaintiffs claimed certain lands as rent-free and certain other lands as included in their zemindari, which the Settlement Officer had recorded as forming part of the defendant No. 1's zemindari. Both these objections were heard by the Settlement Officer,

* Appeals from Appellate Decrees Nos. 1172, 1193 to 1198 of 1906, against the decision of Babu Purna Chandra Ghose, Subordinate Judge, Khulna, dated the 29th March 1906, affirming that of Babu Hem Chandra Mitter, Munsiff Satkhira, dated the 15th August 1905.

and the plaintiffs' claims were not successful. Entries were then made in the finally published record of rights, and defendant No. 1 on the basis of such entries applied, within two months, for the settlement of a fair and equitable rent. Then the plaintiffs instituted the present suit. The question is whether the suit will or will not lie. The Bengal Tenancy Act was passed nearly a quarter of a century ago, but no authority has been produced before us to show that the suit will lie. This portion of the Act deals with a special matter—the settlement by the Revenue Authority of the Record-of-rights; and, special procedure is provided for challenging the decision of the Revenue-Officer; presumably the proper course for the plaintiffs would have been to have instituted a suit under section 106, and under section 108; on their application, the Revenue Officer could have revised his decision under sections 105, 106 or 107 of the Act. But neither of these courses was taken. I agree with both Courts that the present suit does not lie and, I think that the appeals must be dismissed with costs.

Doss J.—I agree. I desire to add a few words: section 106 of the Bengal Tenancy Act has been amended by Act III of 1898, and by that Act much wider powers have been conferred on the Revenue Officer than those he had under the original section as it stood before its amendment. Under section 106 as amended, the Revenue Officer has power to hear and decide, amongst several other things, any dispute between the landlords of neighbouring estates. That implies that the Revenue Officer has power to decide questions relating to boundaries, for the purposes of preparing the record of rights. That being so, it is difficult to see how a regular suit can be brought in the Civil Court for the same purpose.

Moreover, the provision contained in the second paragraph of section 106 points to the same conclusion. It runs thus: "Provided that the Revenue Officer may, subject to such rules as the Local Government may prescribe in this behalf, transfer any particular case or class of cases to a competent Civil Court for trial." If in addition to, or in lieu of, the special remedy prescribed by section 106, a regular suit may be brought in a Civil Court for the same purpose, it is difficult to appreciate the utility of a provision which empowers the Revenue Officer to transfer a case to a competent Civil Court for trial.

N. K. B.

Appeals dismissed.

CIVIL.

1908.

Jogendra Nath Roy

v.
Krishna Pramada
Das.

Maclean, C. J.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

MUKTAKESHI DASI

v.

PULIN BEHARY SINGH AND OTHERS. *

CIVIL.

1908.

July, 20.
August, 4.

Bengal Tenancy Act (VIII of 1885), Sec. 22—'Or otherwise'—Ejusdem generis—Mortgage lien, if subsists.

The words 'or otherwise' in section 22 of the Bengal Tenancy Act, must be construed '*Ejusdem generis*,' and do not include the case of a holding reverting to the landlord on the failure of the tenant's heirs.

Badan v. Rajeswari (1) followed.

In such a case the lien of a mortgagee to whom the tenant had mortgaged the holding, does not subsist.

Appeal by the Plaintiff.

Suit for declaration of title as a mortgagee.

The material facts and arguments appear from the judgment.

Babus Nalini Ranjan Chatterji and Rajendra Chandra Chakravarti for the Appellant.

Babu Sajani Kanta Sinha for the Respondents.

C. A. V.

The following judgment was delivered by

Holmwood J.—A deceased occupancy raiyat, named Bicharam Gosain, mortgaged his holding of $7\frac{1}{2}$ bighas to the plaintiff in Asar 1309. He subsequently died, leaving one brother Banamali, who has also died without leaving any heir, and the landlord has taken over the holding. The plaintiff sued the landlord defendant No. 2 and two other persons, Nobin Chundra Gosain, defendant No. 1, and his wife defendant No. 3, who, he alleges, are in occupation of the land. It is not contended that they are in any way the heirs of Bicharam, but defendant No. 1 who appeared said that his wife defendant No. 3 got the land as a gift from Bicharam. The Munsiff in the first Court disbelieved the story of gift and found there was cause of action against defendant No. 1 as he was in possession. He also found that the vesting of a jote in the landlord on failure of the heirs of a deceased tenant cannot destroy a subsisting mortgage lien. He accordingly gave the plaintiff a mortgage decree.

In appeal, the learned Subordinate Judge found that defendants Nos. 1 and 3 had no subsisting interest in the land and

* Appeal from Appellate Decree No. 1919 of 1906, against the decision of Babu Umesh Chandra Sen, Subordinate Judge, Birbhum, dated the 4th July 1906, reversing that of Babu Siddheshwar Chakravarti, Munsiff, Suri, dated the 23rd November 1905.

against this finding nothing has been urged before us. As regards the vesting of the holding in the landlord defendant No. 2, he held that under section 26, Bengal Tenancy Act, there is no saving clause respecting the right of third persons as sub-lessees or mortgagees and that the landlord defendant No. 2, therefore, did not take the holding subject to plaintiff's mortgage.

As regards the question of transferability, he rightly held that it does not arise in his view of the case though he decided in fact against the custom as regards the jote in suit.

It is urged before us in second appeal that the words of section 22 of the Bengal Tenancy Act "by transfer, succession or otherwise" embrace all cases of devolution or vesting from whatever cause arising, or that in any case they embrace the case of vesting by death of the tenant without heirs under section 26. But in construing words like "or otherwise" it has always been held that the matters reserved must be '*ejusdem generis*' and this is very clearly brought out in the case of *Badan Chandra Das v. Rajeswari Dehya* (1), to which one of us was a party, in the case of surrenders. The proposition stated in the *placitum* to that case, "The terms transfer, succession or otherwise in section 22, Bengal Tenancy Act do not mean and include a surrender; the expression 'or otherwise' as used in the section means 'or in a similar way,'" does not it is true find a place in these exact words in the judgment; but the latter part of the proposition is treated as settled and requiring no exposition, and it is then said that had there been any surrender of an occupancy holding the landlord could not be said to have acquired the land by transfer, succession or otherwise within the meaning of the section.

This way of stating the proposition was enough for the purposes of that case, but we wish to fully adopt the rule as it is laid down in the head-note of the case, as we are of opinion that this is a correct statement of the law.

It is clear from the special provision in section 86 clause (6) of the Bengal Tenancy Act that section 22 does not govern a surrender, since special provision had to be made in that clause for the saving of an incumbrance secured by a registered instrument and no other rights of third parties are recognised. It is also clear that the class of cases referred to in section 22 where the interest of the landlord and the tenant in the holding became united by transfer, succession or other devolution in a representa-

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Muktakeshi Das
v.

Pulin Behary Singh.

Holmwood, J.

Obviously there is no substance in the contention that the expenses of maintenance are saved by the personal law of the person having them, and the superior landlord under whatever title he takes cannot avoid them. But here it is sought to limit the proprietary right of the zeminder by a statutory disability imposed by section 22 of the Bengal Tenancy Act. If that limitation does not apply to a case under section 26 as we hold that it does not it cannot be imposed by any analogy or fanciful interpretation.

We are, therefore, of opinion that the defendant No. 2 in this case is in possession of the land solely in virtue of his original proprietary right, that he does not represent the mortgagor tenant in any way and that there is not and never was any privity of contract between him and the mortgagee. When the tenant died without heirs, all his interest in the holding ceased and became extinct and with it the security of the mortgage held by the plaintiff.

For these reasons we dismiss this appeal with costs.

N. K. B.

Appeal dismissed.

appeal by the appellant.

Application to set aside sale.

The material facts and arguments appear from the judgment.

Babu Dwarka Nath Mitter for the Appellant

Babu Digambar Chatterji for the Respondent.

The following judgment was delivered :

The questions raised before us are whether a second appeal lies to this Court and whether the appellant has *locus standi* to make the present application.

The judgment of the lower appellate Court has proceeded mainly, if not wholly, on the question whether the appellant had a *locus standi* to come in under sections 311 and 244, Civil Procedure Code. The application was dealt with at length by the Court of first instance and that Court allowed the application and set aside the sale complained of. The Munsiff did not say very distinctly that the conduct of the landlord, at whose instance the sale was held on the 14th March 1906, was fraudulent, but we gather that all the essentials both under sections 311 and 244 had been made out in the opinion of the Munsiff who concluded his judgment by observing that 'the sale is vitiated with fraud.' Now, the lower appellate Court in dealing with the merits has dealt with a hypothetical case only. The District Judge observes : " If the findings of fact arrived at by the Munsiff be correct, they amount only to an irregularity and not to fraud, though the Munsiff towards the end of his judgment says that the proceedings were vitiated by fraud, on the findings themselves the case could not be placed higher than under section 311."^{*}

It appears to us that the District Judge has fallen into

* Appeal from Order No 516 of 1907, against the decision of B. C. Mitra, Esq., District Judge of Bankura, dated the 5th September 1907, reversing that of Babu Gopeswar Banerji, Munsiff, Bankura, dated the 29th April 1907.

quent rent decree in execution of which the holding was being bound by that decree he must, on the authority Full Bench, be held to be a representative of the recorded against whom the rent decree was obtained, and, in that matter, he was entitled to come in under section 2 apply to have the sale set aside. He placed his case, not partly under section 311; but in such a case the full force allegations would concentrate in the case of fraud which prosecuted with reference to section 244 of the Code. At this point, the District Judge has not given his decision.

We think that we should not deal with the case ourselves, as to do so would involve a consideration of the evidence we are not entitled to find facts sitting, as we are, in appeal. Even if fraud be regarded as a question of law, parties are entitled to an express decision in the lower appeal Court upon the evidence on which the Munsiff recorded a finding. We do not think it would be in accordance with the practice of this Court for us to examine the findings of the Court of first instance, and, so to speak, ignore the existence of the findings of first appeal. The procedure we follow was also followed by the authorities which we have cited.

We, therefore, allow this appeal and send back the case with this intimation of our opinion that the case must be tried on the merits by the District Judge.

Costs will abide the result.

We assess the costs in this Court at three gold mohurs.
Let the record be sent down at once.

N. K. B.

Appeal allowed ; case remanded

(1) (1904) 9 C. W. N. 134.

(2) (1905) 10 C. W. N. 240.

(3) (1896) I. L. R. 24 Calc. 62.

should not be passed, where the question of the liability to enhancement of the taluk as a dependent taluk under the provisions of section 51 of the Bengal Decennial Settlement Regulation was not put in issue.

A taluk was situated within three zemindaries. The settlement of it was a joint one, but the collection was separate. The proprietor of two of the zemindaries caused the entire taluk to be measured, assessed with rent upon the area found therein, and granted a *dowl* to the holders of the taluk, who agreed to pay their share of rent thus assessed.

Held (per Mitter J.)—That the effect of the *dowl* was to constitute the fractional share of the undivided taluk a separate and distinct tenure with which the proprietor of the remaining zemindary had no concern. Hence in a suit for enhancement of rent of a taluk by the zemindar, the proprietor of the remaining zemindary was not a necessary party.

Appeal by the Defendants.

Suit for enhancement of rent as per notice, of a moiety of Mudafat Krishnananda Biswas which the defendants held as taluk at Chur Butta under Tarafs Pran Krishna Biswas and Mohamad Hosein.

The facts of the case shortly stated were as follows :

The taluk Hadi Ali, consisting of 5 drones and odd kanis, had been created before Decennial settlement. It had some *Towfir* lands which were resumed by Government under Regulation II of 1819 after it purchased the two Tarafs Pran Krishna Biswas and Mohamad Hosein for arrears of revenue. Some 70 or 80 drones of lands were in the possession of the Taluk Hadi Ali, and almost all the lands were of the Chitta of 1194 B. S. The Decennial Settlement was made permanent in 1197 B. S. The lands, which were resumed as *Towfir*, were not separated from the original Taluk, but by one joint settlement the whole of the

* Special Appeal No. 2259 of 1876, against the decree of the District Judge of Tipperah, dated the 14th June, 1876, reversing that of the Subordinate Judge of Tipperah, dated the 21st March, 1876.

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Tewary.

lands (the original and *Towfir*) had been formed into one undivided Taluk and its entire area was held answerable for the entire Jama, old and new. The rent on the resumed lands was assessed after the Permanent Settlement.

The taluk was an undivided tenure under three Tarafs, or zemindaries, *viz.*, Taraf Bhowani Churn, Taraf Pran Krishna Biswas and Taraf Mahamad Hosein Khan. In the year 1841 it was in the possession of one Krishnanund Biswas. At that time, the last mentioned two Tarafs were held by Government as a *khas* mehal. As between these three Tarafs, so far as the taluk was concerned, there was no demarcation of lands, but the rents were payable in the proportions of 4 Annas odd Gundas, 7 Annas odd Gundas and 4 Annas odd Gundas. In the year 1841, the Government, as the proprietor of the *khas* mehal, caused the entire taluk to be measured, and assessed the area found therein at a rent of Rs. 1489-14 as. A *dowl* was granted by Government to the then holder of the taluk, who agreed to pay to the former their share of the rent thus assessed.

The plaintiffs brought a suit for enhancement of rent, as per notice, of a moiety of Mudafat Krishnanund Biswas. The defence was that the notice was bad; that the sharers in the zemindari under which the taluk was, had not been made defendants; that the claim to enhance the rent of a moiety of an undivided taluk brought forward by co-sharers, was not maintainable; that the claim had not been valued as directed by law; that the taluk had been created before Decennial Settlement and was a *maurusi* permanent tenure under Tarafs Pran Krishna Biswas, Mohamed Hosein and Bhowani Charan, and its rent could not be enhanced.

The following issues were settled:

"1. Whether the notice had been written and served as directed by law?

"2. Whether the plea of not making all the sharers defendants is true? If so, whether the claim is maintainable?

"3. Whether it is true that the taluk is in existence from before 1790?"

The Court of first instance dismissed the suit on the grounds that the notice served upon the defendants was bad in law and that there was a defect of parties as the plaintiffs had not made the proprietor of Taraf Bhowani Charan defendants in the case.

Upon appeal the Judge came to a different conclusion upon the evidence, and the effect of the proceedings taken by the

Revenue officer. He held that there was no defect of parties and that no notice was required even if section 51 of Regulation VIII of 1793 applied. He also held that the Court of first instance should have given a declaratory decree although it found the notice bad in law. From that decree, the defendants appealed specially to the High Court.

Mr. R. T. Allen for the Appellants.

Babus Mohiny Mohun Roy and Bharut Chunder Dutt for the Respondents.

The judgments of the Court were as follows :

Birch J.—This suit is brought to recover rent at an enhanced rate upon a taluk held by the defendant in mouzah Buttia after service of notice.

The defendant pleads that his taluk is a *mouassee* taluk held at a fixed rent and created prior to the Permanent Settlement, that a Permanent Settlement thereof was concluded with his predecessor Krishnanand Biswas after amalgamating the original Taluk Hadi Ali and the land resumed as *towfir* appertaining thereto as one, and treating the whole area as forming a taluk existing before the Permanent Settlement. He alleges that the Juma was subsequently reduced by Government owing to the poverty of the land resulting from inundation by salt water, but denies that this abatement affects his right to hold at an invariable rent. He goes on to object to the rate claimed.

The Subordinate Judge found that the talook was created before the Permanent Settlement and that the defendant was therefore entitled to a notice under section 51, Regulation VIII of 1793. He was of opinion, that when the *towfir* land was assessed, the old and the newly-assessed lands were treated as forming one taluk having its origin prior to the Permanent Settlement. He considered the notice served upon the defendant as bad in law and dismissed the suit both upon that ground and also on the ground that there was a defect of parties as the plaintiffs had not made the proprietor of Taraf Bhowani Churn defendants in the case.

Upon appeal the Judge came to a different conclusion upon the evidence, and the effect of the proceedings taken by the Revenue officer.

He first held that there was no defect of parties, that the plaintiffs having been separately registered in the Collector's books and having made separate collections, there was nothing to prevent them from instituting this suit.

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He then discusses the history of the taluk and remarks that there is no contention as to the existence of taluk Hadi Ali at the time of the Decennial Settlement with a nominal Juma of Re. 1-11-9 and an area of 5D 2K 11½G. In 1839 attention was, he says, drawn to the taluk, and it was discovered that the talukdar was in possession of 48 drones. The result according to the Judge was that excluding the 5D 2K 11½G, settlement was concluded for the rest of the land at Rs. 1,488-2-9. Some years after, the Juma was reduced to Rupees 103 at which it remained. The plaintiffs' measurement now shows the area to be 50D 13K 14G; from this deducting 5D 2K 11½G, 45 drones would remain liable to enhancement from which other deduction being made the Judge would give enhanced rent on a moiety of 10 drones.

The Judge then says that it is not contended that the lands other than the 5D 2K 11½G are not open to enhancement and supposes the Subordinate Judge to say that they are.

He then observes that the Subordinate Judge should have given the plaintiff a declaratory decree.

Next, he says, no notice is required even if section 51, Regulation VIII of 1793, applies; the Judge being of opinion that the section does not apply.

As to the term of the settlement, the Judge considers that it was a yearly settlement terminable at the end of each year according to the pleasure of the contracting parties.

The Judge gives the plaintiff a decree based as he supposes upon the defendants' calculation as to the rates payable.

In special appeal, it is contended that the Judge has misapprehended the purport and effect of the proceedings of the Revenue Authorities, that he is wrong in law, *first*, in holding that notice was not necessary, *secondly*, in holding that the suit was maintainable, and *lastly*, wrong in holding that the Sub Judge ought to have given a declaratory decree although he found the notice bad in law.

It will be more convenient to dispose of the latter objection first.

It is admitted here that notice was under any view of the case necessary, and the Judge is undoubtedly wrong in saying that no notice is required under section 51, Regulation VIII of 1793.

I think that the Judge is also wrong in saying that a declaratory decree should have been given in this case. The authority that he cites does not support him. In the case cited,

the question of the liability of the tenure to enhancement was put in issue and fully tried. In the present case, no such issue was framed, nor was the point tried. All that the Subordinate Judge does is to express an opinion that as the Juma had been reduced, the abatement had subjected the taluk to the third condition of section 51. But he refuses to try the question as that was not the ground of the plaintiffs' suit.

The Judge is wrong in saying that it was not contended that the lands in excess of the 5D 2K 11½G were not open to enhancement; the defendant's plea was that the whole of the land was treated as settled at the time of the Decennial Settlement and was held and owned as a *maurasi kaimi* tenure.

The Judge is further wrong in his facts when he represents the defendant as admitting the rate to be Rs. 3 per kani. What the defendant says in his written statement is that the rate for good land does not exceed Rs. 3 but he goes on to say that the plaintiffs have made no deduction on account of the unculturable and other land much of which he says is unfit for cultivation.

These misconceptions on the part of the Judge lead me to think that this case has not been carefully dealt with in appeal. The important documentary evidence which was considered by the Subordinate Judge has not received from the Judge the consideration that it merits, and it now remains for us to consider that evidence.

The Judge disposes of the important contemporaneous reports of the Board of Revenue and the Commissioner regarding the settlement of this taluk in a very summary manner. He says "they are not decisions on the question touched upon, and as far as they go, are characterized by great uncertainty and supposition."

But it appears to me that when the point at issue is, as it is in this case, how was this taluk dealt with by the Revenue Authorities in 1839, the correspondence regarding it between the Board of Revenue and the local Officers is of great assistance in helping us to consider the point and arrive at a right decision.

Paras 38, 39 and 40 of Mr. Lewis' memorandum are as follows:

38. "The case in question appears to be pretty much like some of the Sundeep cases.* In the former measurement of Mouzah Butta Chur, taluk Mirza Hadi Ali was entered as 5D 2K 11G 2C, of which 4K 16G 1C were *Hasili* and assessed at a rental of Re. 1-10 annas payable to the zemindars. It is found now to

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* Vide Para 40 of Mr. Dampier's Report.

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contain 47 drones of *old* land, and it is inferred that the difference was fraudulently concealed in Mr. Rowlin's time. But it is not shown that all the surrounding taluks of Mr. Rowlin's time are still in existence, and unless that be made clear, the fact that this taluk now contains eight times as much *old* land as it did formerly, may prove, not that the talukdar cheated Mr. Rowlin, but that he has found opportunities since to encroach upon his neighbours.

39. "It appears that Mr. Donnithorne instituted a suit under Regulation II. of 1819 against the talukdars for the assessment of the *towfir* lands of this *shikmi* taluk which was decided by Mr. Blagran in favour of Government on the 26th November 1829; attachment of the whole taluk having immediately been had recourse to.

40. "The resumption decree in this case is not with the record, but from the account given of it by Mr. Dampier in paragraphs 40 to 43 of his report, there is no doubt that the whole of the lands in question were held as forming a dependent taluk of a permanently settled zemindaree, and the institution and decision of a resumption suit under such circumstances by Officers not exercising the powers of settling Officers as set forth in Regulations VII of 1822 and IX of 1825, was to say the least of it informal. That the resumption of the *towfir* taluk was a perfectly just measure, there is no doubt, and that being the case, the acquiescence of the talukdar may be fairly held to have mended any defect in the form of resumption which may have occurred."

From these paragraphs it appears that the results of the proceedings under Regulations VII of 1822 and IX of 1825, were to treat the whole area found as one taluk and as a taluk existing at the time of the Decennial Settlement, and the *Dowl* shows that, in accordance with Mr. Lewis' recommendations, a settlement of the *shikmi* tenure was concluded in 1841, the *dassala* land, and the excess land being treated as one integral estate and not dealt with separately. These papers effectually confute the correctness of the Judge's finding that the *old* land and the excess land were dealt with separately, and they support the conclusion arrived at by the Subordinate Judge that the lands assessed as *towfir* were not separated from the original taluk, but were, by one joint settlement of the whole of the lands, formed into one undivided taluk, and treated as a taluk existing prior to the Decennial Settlement.

I think that the Judge has come to an erroneous decision in

this case, and that he has not appreciated the value of the evidence adduced by the defendant.

The Subordinate Judge has duly considered all the evidence, and I have no doubt that he is right in holding that the defendant's taluk is one to which the provisions of section 51, Regulation VIII of 1793, are applicable.

I would reverse the order of the Judge, and dismiss the plaintiff's suit with costs.

Mitter J.—I concur. I desire to add that the plaintiffs' suit is not open to any objection on the ground of defect of parties. It seems to me that it was not necessary for the plaintiffs to make the proprietors of Taraf Bhowani Churn parties to this suit.

It appears that the whole of the Chur Buttia is situated within three Tarafs or zemindaries *via.*, Taraf Bhowani Churn, Taraf Pran Krishna Biswas and Taraf Mohamed Hossein Khan. In the year 1841 it was in the possession of one Kishna-nund Biswas. At that time the last-mentioned two Tarafs were held by Government as a *khas* mehal. As between these three Tarafs, so far as this Chur is concerned, there was no demarcation of lands, but the rents were payable in the proportions of 4A. 2G. 3C. 7A. 15½G. and 4A. 1G. 3C. respectively. In the year 1841 the Government as the proprietor of the *khas* mehal, caused the entire chur to be measured, and assessed the area found therein at a rent of Rs. 1489-14-6. A *Dowl* was granted by Government to the then holder of the chur, who agreed to pay to the former their share of the rent thus assessed. The effect of this *Dowl*, it seems to me, was to constitute the fractional share of the undivided chur which was within the Government *khas* mehal a separate and distinct tenure, with which the proprietors of Taraf Bhowani Churn had no concern. I am therefore of opinion that they are not necessary parties to the suit.

But the plaintiffs' suit should be dismissed upon the ground that the notice issued in the case is insufficient. Construing the *Dowl* in the light of the letter of the Board of Revenue and upon which it is expressly based, it seems to me clear that the Government in the year 1841 treated the whole chur as constituting a taluk existing from the time of the Permanent Settlement. The view which they took of the position of the taluk was this; that the whole of it was held as a dependent taluk from the time of the Decennial Settlement, but the taluk was paying rent of a small quantity of land comprised in it, was liable to enhance-

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ment on account of the excess lands of the taluk. It is true that this view was opposed to the findings arrived at in a resumption suit regarding these lands, but the Board of Revenue found that there was some kind of irregularity connected with this resumption proceeding which might render its validity questionable. They, therefore, thought it right to waive any advantage that the Resumption decree might give them, and were satisfied with an additional rent for the excess lands treating the whole taluk as one existing from the time of the Decennial Settlement. In accordance with this view, the *Dowl* was executed and the plaintiffs who are purchasers from Government are certainly bound by its conditions.

The taluk in question, therefore, should be considered as a dependant taluk within the meaning of section 48 of Regulation VIII of 1793.

This being so, the notice of enhancement that has been issued in this case is not legally sufficient, because it does not appear to me to be a notice under section 51 of that Regulation. The suit therefore should be dismissed upon this ground.

As regards the contention that at any rate a declaratory decree declaring that the defendant's tenure is liable to enhancement should have been passed, it is sufficient to say that the question of the liability to enhancement of the taluk as a dependant taluk under the provisions of section 51 of Regulation VIII of 1793 was not put in issue in the Courts below.

I am therefore of opinion that this special appeal should be decreed, and, the plaintiffs' suit dismissed with costs.

A. T. M.

Appeal decreed : suit dismissed.

PRIVY COUNCIL.

PRESENT :—Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble, and Sir Arthur Wilson.

PANDIT GAYA PARSHAD TEWARI

v.

SARDAR BHAGAT SINGH AND ANOTHER.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

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Malicious Prosecution, suit for, damages for—Principles applicable to the case
—Prosecutor—Malice, the foundation of the action—When may malice be shown—Knowledge of the defendant as to the falsity of the charge—Liability in such a case.

In an action for damages for malicious prosecution, the person who can be made liable is the prosecutor.

The determination of the question as to who the real prosecutor is, depends upon all the circumstances of the case. The mere setting of the law in motion, is not the criterion, nor is it enough to say that the prosecution was instituted and conducted by the police; the conduct of the complainant, before and after making the charge, his means of information and motives, must also be taken into consideration.

The foundation of the action is malice, and malice may be shown at any time in the course of the enquiry; a prosecution commenced *bona fide*, may become malicious in any of the stages through which it has to pass.

Narsinga Row v. Muthaya Pillai (1) explained and distinguished.

Fitz John v. Mackinder (2) followed.

Appeal from a decree of the Court of the Judicial Commissioner of Oudh (December 14, 1905) reversing a decree of the Court of the Subordinate Judge of Bahraich (July 31, 1905.)

The principal question involved in the appeal was whether, on the facts found, the respondents were liable in law to an action for damages for malicious prosecution.

In the Kapurthala Estate is a village called Shukulpurwa. In the Rampur Mathura Estate is a village called Keora. Between these two villages flows the river Ghoora. The first respondent, Sardar Bhagat Singh, was, in 1902, the Munsarim, and the second respondent, Imamuddin Shah, was, in the same year, the Kanungo of the Boundi division of the Kapurthala estate, in which the village of Shukulpurwa is situate. The appellant, Pandit Gaya Parshad, was, at that time, naib or manager of the Rampur Mathura estate.

Gulab Singh on behalf of the Kapurthala estate under section 107 of the Code of Criminal Procedure to the Deputy Collector of Bahraich, who sent the application for inquiry by the Sub-Inspector of Police Izhar-ul-haq. Certain persons named in the application were charged, and the appellant's name was not mentioned. Before the Police, the respondents conducted the prosecution. The respondents procured evidence that a riot was committed and that the appellant had personally taken part in the riot. By procuring such evidence the respondents induced the Sub-Inspector of Police to send the appellant and the other accused for trial before the Deputy Collector of Bahraich. The prosecution was conducted by a Barrister instructed by Bhagat Singh and Imamuddin Shah, and pressed under their instructions against the appellant. Those proceedings terminated by an order made by the Magistrate on July 15, 1903, acquitting the appellant and all the other accused persons, and expressing the opinion that the charges had been concocted by the respondents.

On July 14, 1904, the appellant instituted the present suit in the Court of the Subordinate Judge of Bahraich, claiming damages from the respondents for malicious prosecution. The respondents by their written statement resisted the claim on the following grounds :—Paragraph 11. Defendants did not institute any criminal prosecution, and were mere witnesses for the prosecution.

Paragraph 12. Defendants as witnesses were justified in making the statements they did in the Criminal Court, and no suit can legally be brought against them.

Paragraph 13. The prosecution was not malicious and without reasonable and probable cause, nor did it arise from any illegitimate motive.

dents did not appear on the face of the criminal proceedings, yet that in fact they were the prosecutors, that they had "concocted and fabricated false evidence to get the appellant charged with rioting," that there was no reasonable and probable cause for the prosecution ; and that the respondents had acted maliciously. He accordingly made a decree in favour of the appellant, awarding him the sum of Rs. 6,082-8-0 as damages, and the costs of the suit.

Against that decree the respondents appealed to the Court of the Judicial Commissioner of Oudh, and on December 14, 1905, the second additional Judicial Commissioner delivered judgment in the appeal. On the authority of the cases of *Narsinga Row v. Muthaya Pillai* (1), and *Dudh Nath Kundu v. Mathura Prasad* (2), he with hesitancy decided that no one but a person who has made a formal complaint or application for process to a Court can be sued for damages for malicious prosecution. The part of his judgment referring to the merits of the case is given in their Lordships' judgment below. He accordingly made a decree dismissing the suit, but without costs.

Special leave to appeal to his Majesty in Council against that decree was granted to the appellant by two Judges of the Court of the Judicial Commissioner of Oudh, under section 595 clause (c) of the Code of Civil Procedure (Act XIV of 1882), on the ground of the importance of the question of law raised, and on the ground that the question had been wrongly decided, and that the decision was opposed to the authority of the case of *Musa Yakub Moay v. Manilal Ajitrai* (3) decided by the Bombay High Court.

(1) (1902) I. L. R. 26 Mad. 362.

(2) (1902) I. L. R. 34 All. 317.

(3) (1904) I. L. R. 29 Bom. 368.

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Mr. De Gruyther, K.C., and Mr. S. A. Kyffin, for the Appellant :—There is no appeal on the question of the amount of damages. The High Courts in India are not unanimous on the question—who can be sued for damages for malicious prosecution. The Madras and the Allahabad High Courts have held that no one but the person who has made a formal complaint or application for process to a court can be sued for damages for malicious prosecution, and where a person merely gives information to the police, and the police, after investigation appear to have thought fit to prosecute the plaintiff, the person giving information is not responsible for the act of the police and no action for damages for malicious prosecution will lie against him : *Dudhnath Kundu v. Mathura Prasad* (1), and *Narsinga Row v. Muthaya Pillai* (2). But the Bombay High Court has held that a person is responsible not merely for starting a prosecution but also for continuing the same, and he is also responsible whether such prosecution was ordered by the court or was initiated by the party himself : *Musa Yakub Mody v. Manilal Ajitrai* (3). It is submitted that the Bombay High Court is right. The Bombay High Court followed *Fitz John v. Mackinder* (4). The findings of fact arrived at by the Subordinate Judge have been practically affirmed by the Judicial Commissioner, and on the facts as found by the Courts in India, it is clear that the respondents knew that they were giving false information to the police. They in fact conducted the prosecution and concocted the evidence. The Crown was the nominal prosecutor. They actually instructed and paid counsel to press the charge against the appellant. The real foundation of the action is malice, which may appear at any stage of the proceedings. It is submitted that the respondents have shown malice in this case and that they are liable for damages for malicious prosecution : *Fitz John v. Mackinder* (4). Reference was also made to the Code of Criminal Procedure (Act V of 1898) sections 4 (n), 107, 147, 156 and 495, and Schedule II to that Code.

The respondents did not appear.

The judgment of their Lordships was delivered by

July, 31.

• **Sir Andrew Scoble.**—This is an action for damages for malicious prosecution. The parties are officials of adjoining estates, the plaintiff being manager of the Rampur Mathura.

(1) (1902) I. L. R. 24 All. 817.

(2) (1902) I. L. R. 26 Mad. 362.

(3) (1904) I. L. R. 29 Bom. 368.

(4) (1861) 9 C. B. N. S. 506, and at pp. 532 and 533.

estate, and the defendants being respectively Munsarim and Kanungo of the Boundi division of the Kapurthala estate. The case arose out of a dispute regarding the ownership of some alluvial land lying between the two estates ; and the charge was that the plaintiff had taken part in a riot connected with this dispute. The case was sent for trial on the 22nd November 1902, but was not disposed of until the 15th July 1903, when the Magistrate dismissed it, holding that "there was no riot at all," and adding :

"I consider Kapurthala estate entirely to blame in this case, and hold that Sardar Bhagat Singh (assisted by Imam-ud-din Shah) is responsible for concocting up these riot and theft cases with all the minor complaints."

The plaintiff thereupon brought this action, claiming Rs. 7,000 damages. The Subordinate Judge held that "it was found during the trial of the criminal proceedings, and proved before me by the evidence in the case, that the two defendants have concocted and produced false evidence to get the plaintiff charged with the crime." and he gave the plaintiff a decree for Rs. 6,082-8 damages and the costs of the suit. The Judicial Commissioner on appeal, on the authority of the case of *Narasinga Row v. Muthaya Pillai* (1) dismissed the suit, holding that "if the police or magistracy decide to act on information given by a private individual without a formal complaint or application for process, the Crown becomes the prosecutor and not the individual"; but he added :

"I may say that, having studied the documentary evidence to which my attention was drawn, and read most of the voluminous oral evidence recorded by the Subordinate Judge, I am disposed to believe that the Sub-Inspector did institute a charge under Section 147 at the instigation of Bhagat Singh and not of his own motion ; that the charge was found false by the Magistrate who tried the case ; and that the evidence on the record produced by the appellants is not such as to incline me to believe it to have been proved."

It will be convenient to refer at once to the decision of the Madras High Court (1) which the learned Judicial Commissioner appears to have followed with some reluctance. The judgment is in these terms :

"The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though

(1) (1902) 1. L. R. 26 Mad. 363.

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the first defendant may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police, and the police, after investigation, appear to have thought fit to prosecute the Plaintiff. The defendant is not responsible for their act, and no action lies against him for malicious prosecution."

The principle here laid down is sound enough if properly understood, and its application to the particular case was no doubt justified; but in the opinion of their Lordships, it is not of universal application. In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the police by bringing suborned witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the magistrate—it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be—Who was the prosecutor? and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant, before and after making the charge, must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown. In India, a private person may be allowed to conduct a prosecution under section 495 of the Criminal Procedure Code, which provides that "any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police Any person conducting the prosecution may do so personally or by a pleader." When this is permitted, it is obviously an element to be taken into consideration in judg-

ing who is the prosecutor and what are his means of information and motives. The foundation of the action is malice, and malice may be shown at any time in the course of the enquiry. As Bramwell, B., observes in *Fitz John v. Mackinder* (1).

"This action is not for damages in respect of the preferring of the indictment only, but also for the residue of the prosecution, and the damage consequent upon it. . . . Where an action is maintainable in respect of the whole prosecution, including the preferring of the bill, it is in part maintainable for the subsequent stages and conduct of it."

And in the same case, Cockburn, C.J., says (at p. 531):

"A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or, if spontaneously undertaken, from having been commenced under a *bona fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malò animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused."

Turning to the facts of the present case, it appears that on the 2nd November 1902 an application was made to the Deputy Collector of Bahraich for an investigation by the police of a charge of unlawful assembly against eight persons, of whom the plaintiff was not one. The investigation was entrusted to Izhar-ul-haq, a Sub-Inspector of Police, who says:

"I summoned the plaintiff because Bhagat Singh gave me a list of accused persons containing plaintiff's name. . . . When Bhagat Singh produced that list, I said to him that the complaint filed in Court did not contain Gaya Parshad's name. How was it that the defendant has mentioned his name . . . ? And then Bhagat Singh [said] that the chief cause of riot was the plaintiff; so he gave the plaintiff's name in the list, and that he would be summoned."

This makes it clear that Bhagat Singh was directly responsible for any charge at all being made against the plaintiff. Imam-ud-din was the person who made the original report of an unlawful assembly, upon which the prosecution for riot was ultimately based, and the two men appear to have acted together throughout the subsequent proceedings. They took the principal part in the conduct of the case both before the police and

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in the Magistrate's Court ; and the learned Counsel who appeared for the prosecution at the trial before the Magistrate expressly says that they instructed him that Gaya Parshad "joined the riot." As already mentioned, the Magistrate found that there was no riot at all, and that on the day on which it was alleged to have occurred, the appellant was ill at Lucknow. The charge was a false one to the knowledge of the respondents, and they must abide the consequences of their misconduct.

In granting leave to appeal to His Majesty in Council, the learned Judicial Commissioners say :

"It is difficult to overestimate the importance of the question raised in this case, namely, whether a person may be sued for damages for malicious prosecution who makes a false report which results in a prosecution, or who instigates the police to send persons up for trial under section 170 of the Code of Criminal Procedure, or who conducts the case against those persons when sent up for trial."

And they add :

"All these are circumstances which occur perhaps daily in every district in India, and having regard to the immense number of false charges made, (we) think it most desirable that there should be no doubt as to the law on the subject."

In the opinion of their Lordships, it would be a scandal if the remedy provided by this form of action were not available to innocent persons aggrieved by such unfounded charges, and they will humbly advise His Majesty that the appeal ought to be allowed and the decree of the Judicial Commissioner set aside, with costs, and that of the Subordinate Judge confirmed. The respondents must pay the costs of the appeal.

Messrs Sanderson, Adkin, Lee & Co. :—Appellant's Solicitors.
The Respondents did not appear.

J. M. P.

Appeal allowed.

PRESENT :—*Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble,
and Sir Arthur Wilson.*

BANK OF BOMBAY AND ANOTHER

v.

SULEMAN SQMJJI AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

*Mortgage by executor, setting aside—Executor and residuary legatee—Deeds,
deposit of, with a mortgagee—Constructive notice—Legacy—Will*

A mortgage by an executor, who is also residuary legatee, to secure his private debts, may be set aside even at the suit of a pecuniary legatee: the position of creditors is less favourable, as a mortgagee without notice may be safe as against them.

In re Queale's Estate (1), followed.

Graham v. Drummond (2), distinguished.

Where deeds were deposited with a mortgagee, the contents of which, and, enquiry based thereon, would have led to the discovery of a charge on the mortgaged premises, the mortgagee must be taken to have had constructive notice of the charge.

Where a legacy was payable within six years of the death of the testator, and the executor created a mortgage eight years after the due date, the mortgagee was not entitled to assume the consent of the legatees in spite of the lapse of time, as two of the legatees were infants and the continued possession of the estate by the executor, was not inconsistent with the purposes of the will.

Appeal from a decree of the High Court of Judicature at Bombay, Appellate side (3), (April 14, 1905) varying a decree of Chandavarkar J, made in its original jurisdiction (4), (August 23, 1904.)

The principal question involved in the appeal was whether the claims of the plaintiffs, who were legatees under the will of their father Somji Parpia, had priority over a mortgage executed in favour of the appellant Bank by the executors and residuary legatees.

The facts relating to the suit were not in dispute. Somji Parpia, a Khoja Mahomedan of Bombay, died on February 15, 1885, leaving him surviving his widow Labai, and eight sons, of whom four were the sons of a deceased wife. The four sons of the deceased wife (hereinafter called the elder sons) were Rohim-tolla Somji Parpia, the respondent Jaffer Somji, Goolam Hoosein Somji, and the respondent Alladin Somji. The four sons of the widow Labai (hereinafter called the younger sons)

(1) (1886) 17 L. R. Ir. 361.
(2) (1896) L. R. I. Ch. 968.

(3) (1905) 7 Bom. L. R. 407.
(4) (1904) 6 Bom. L. R. 800.

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were the respondents Suleman Somji, Goolam Ali Somji, Mahomed Somji, and Habib Somji. Of the younger sons Suleman Somji alone had attained the age of majority at the time of the death of Somji Parpia and the rest were minors. Goolam Ali Somji attained the age of majority in 1897, and Mahomed Somji and Habib Somji, who were twins, in 1901. Somji Parpia made his will on February 13, 1885, which was attested on the day of his death. The following are the important clauses of that will :

Clause 1.—My property consists of my 2 shops (for the sale) of furniture and other Europe goods and of a moiety of a house belonging to me, situated in the Bhajipala Street bearing number and standing in the name of my brother Dhanjibhai Parpia who is now dead, and of the play-house, situated on the Falkland Road which is known by the name of the "Elphinstone Theatre" and which now stands in the name of my son Golam Husein Somji. The said properties and the outstanding debts (due to me) in Bombay and at out-stations belong to me. I possess all these properties at present.

Clause 3.—I bequeath all my abovementioned property, such as all the goods in the two shops, outstanding debts, claims and debts and the abovementioned moiety of the house, situated in the Bhajipala Street and the theatre &c. (*i. e.*) the whole of the (said) property and goods to the sons of my former deceased wife (namely) Rohimtolla, Jaffer, Goolam Hoosein and Alladin four persons. None of (my) other heirs has any claim or title thereto. But as to the moiety of the abovementioned house belonging to me I exclude the right thereto of my elder son Rohimtolla and I reserve the right of my three sons only, namely, Jaffer, Goolam Hoosein, and Alladin, these three persons, to (my) said moiety of the house. To the remaining property, the above mentioned four persons are entitled in equal (shares.)

Clause 4.—For (my) remaining heirs I order my above mentioned sons four persons, whose names are Rohimatolla, Jaffer Goolam Hoosein, and Alladin that they shall duly give and act in accordance with what is written below :

Clause 5.—To my present surviving wife Labai and to her sons named Suleman, Goolam Ali, Mahomed and Habib my said elder sons, four persons to whom I entrust all my goods and property shall within 6 years namely, six years after my decease, duly make up and pay Rs. 30,000 namely, thirty thousand to my surviving wife and to her sons. The same shall be paid (to them) in the

following manner. No interest on the said (sum of) money shall be paid up to the abovementioned period, and up to that period there shall duly be paid Rs. 125 namely one hundred and twenty five every month for house-hold expenses and before the abovementioned sum of Rs. 30,000 namely thirty thousand is fully made up, if the betrothal (or marriage etc.) of any son or daughter should take place, then as to the proper (sum of) money that may be required for the expenses thereof, the same shall truly be paid out of the (abovementioned) sum, and when the abovementioned sum of rupees thirty thousand shall have been fully made up (and paid) then from that day the aforesaid (sum) of rupees one hundred and twenty five being the amount of the instalment payable every month for the expenses shall duly cease, that is to say, the same shall not be paid thereafter. Besides this my second surviving wife and her children shall have no manner of right or claim against 4 persons (namely my) sons by my first deceased wife or against my said goods and property in any way whatever.

Clause 6—As to the (sum of) Rupees thirty thousand directed to be paid out of my abovementioned goods and property as a share of inheritance by my abovementioned elder sons 4 persons to my surviving wife and her sons mentioned in the 5th clause, I appoint 4 persons as trustees in respect of the said (sum of) money. Their names are Jaffer Somji, Goolam Hoosein, Somji, Jaffer Ladhahbai Chatu and my second surviving wife, I appoint these 4 persons (as trustees) and I direct them as follows :—The said (sum of) money shall truly be appropriated in accordance with what is written below. Out of the abovementioned sum of rupees thirty thousand which my elder sons shall pay to my surviving wife and her sons as a share of inheritance the outlays on auspicious and inauspicious occasions, whatever the same may come to having been deducted, as to whatever the same may remain over a good "estate" or a house shall be purchased therewith and given (to them). The same shall be purchased in the names of my surviving wife and her sons and given to them ; or (the money) shall be deposited at interest at a good place and out of the income that may be realised therefrom, (moneys) shall be paid to my surviving wife during her life-time for her and her children's lodging, food and clothes and other expenses.* And after the decease of my surviving wife when her youngest son shall come of age whatever property there may be (left out) of the said (sum of) rupees thirty thousand, the

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same shall truly be divided and given in equal shares to her children.

Clause 9.—I recommend my 4 elder sons mentioned in the 4th clause as follows :—If my second surviving wife and her sons should live in peace and harmony with them (my sons) shall allow them to live in the moiety 'belonging to me of the said house situated in the Bhajipala Street.

Clause 10.—I recommend my said 4 elder sons to whom I bequeath all my goods and property, shop &c., as follows :—After my life-time they shall continue to carry on trade and business in my name and having come to an understanding between themselves and apportioned their respective shares they shall make a writing in respect thereof and shall carry on trade and business in accordance with their own free will and pleasure.

Clause 12.—I nominate or (and) appoint my said four sons named Rohimtolla, Jaffer, Goolam Hoosein and Alladin executors of (this) my said will. They shall truly bring into force all the provisions of the said will, and I further direct (my) said executors or my elder sons as follows :—As long as they shall carry on trade and business in my name they shall set apart rupees 300 (three hundred) every year on account of charity and out of the same they shall truly give (money) in charity in such manner as they may think proper.

Meenabai, the widow of Dhanji Parpia, the brother of Somji Parpia, died in 1889 leaving a will dated December 18, 1880, by which she gave a legacy of Rs. 200 each to the sons of Somji Parpia other than Rohimtolla, and absolutely bequeathed her husband's half share in the house in Bhajipala Street to Rohimtolla, whom she described in the will as her and her husband's adopted son. A recital in the will was : "And whereas my said late husband Dhanji Parpia had one equal half share or moiety with the said Somji Parpia in the dwelling house or hereditaments and premises bearing No. 9 situate in Bhajipala Street without the Fort in the Island of Bombay and which are registered in the Books of the Collector of Land Revenue and the Collector of Municipal Taxes in the name of my late said husband and are occupied and enjoyed by myself and the said Somji Parpia."

After the death of Somji Parpia, the elder sons carried on business at Bombay, Indore and other places, as contractors for the construction of roads, buildings, and other works, as co-partners, under the style or firm of Somji Parpia and Company.

The appellants the Bank of Bombay (hereinafter called the Bank) acted as bankers to the elder sons in the course of such business. On September 1, 1890 the elder sons deposited with the Bank the following deeds and documents as security for advances :

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Deeds relating to a dwelling house in Bhajipala Street.

1. Copy of the Will of Meenabai widow of Dhanji Parpia, dated 18th December 1880.

2. Conveyance dated 12th March 1861 by Khan Mahomed Habibhoy and Karim Khatay to Dhanji Parpia.

Deeds relating to a Theatre in Falkland Road.

1. Copy of Lease dated 14th October 1892 by Sha Moolchand Nensey to Goolam Hoosein Somji Parpia.

2. Conveyance dated 26th August 1882 between Peerbhoy Nathoo to Goolam Hoosein Somji.

3. Indenture dated 22nd August 1884 between Javerbai and Goolam Hoosein Somji.

On January 12, 1899, the Bank held thirteen bills of exchange drawn by Somji Parpia and Co., at Bombay on and accepted by Somji Parpia and Co., at Indore, for amounts, aggregating together Rs. 52,000, five of which bills for amounts, aggregating Rs. 18,500, were then overdue. The Bank called upon the elder sons to pay off those bills of exchange which had fallen due and to find security for the others, and it was ultimately agreed between the parties that the elder sons should find security for the amount of all the bills of exchange in consideration of the Bank agreeing not to enforce payment before October 12, 1899. Accordingly on the same date, *i. e.*, January 12, 1899, the elder sons executed in favour of the Bank a deed of mortgage purporting to mortgage the entirety of the house in Bhajipala Street and the land in Falkland Road with the theatre erected thereon for securing payment of the moneys due and to become due upon the bills of exchange with interest thereon at the rate of 9 per cent. per annum. The mortgage deed recited *inter alia* that the mortgagors were entitled to the entirety of the house in Bhajipala Street and that the mortgagors or one or more of them were also entitled to the land in Falkland Road with the theatre thereon.

From the death of Somji Parpia down to the death of his widow, Labai, she and the younger sons, and from her death, which occurred in 1894, until after the institution of the suit, the younger sons lived amicably with the elder sons in the house in

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Bhajipala Street. Jaffer Ladhahbai Chatu, one of the trustees, also died in 1894. In June 1903 the Bank having in exercise of the power contained in their mortgage advertised the sale by public auction of the properties comprised in it; the younger sons gave notice in writing to the Bank that under the will of their father Somji Parpia they had a charge on the properties to the extent of Rs. 30,000 and that if the properties were to be sold, they should be sold subject to the charge. The Bank postponed the sale, after having intimated in writing to the younger sons, that the sale was to be of the right, title and interest of the mortgagors, the elder sons.

On September 1, 1903 the younger sons instituted in the High Court of Judicature at Bombay in its ordinary original civil jurisdiction the present suit against the elder sons and the Bank. The plaint alleged that under the will of their father, Somji Parpia, the property mortgaged by the elder sons to the Bank was charged with the payment of Rs. 30,000 and a monthly allowance of Rs. 125 to the plaintiffs and their deceased mother Labai, that divers sums were from time to time paid by the elder sons in respect of the sum of Rs. 30,000 and the monthly allowance of Rs. 125 respectively, but at the commencement of the suit large sums remained unpaid and owing in respect thereof respectively, and that the Bank took the mortgage with actual or constructive notice of the charge on the properties in favour of the younger sons. The plaintiffs claimed *inter alia* priority in respect of the charge as against the Bank and asked the Court to pass a decree for the due administration of the properties of the deceased Somji Parpia which became vested in the elder sons as his executors and heirs subject to the charge. By an indenture dated January 14, 1904 the Bank transferred the mortgage to the second appellant Dwarkadas Dharamsey for a consideration of Rs. 42,000. Pursuant to an order of the Court, Dwarkadas Dharamsey was brought on the record as defendant No. 6. Rohimtolla Somji Parpia did not defend the action and the written statement of the others of the elder sons stated among other things that one moiety of the house in Bhajipala Street belonged to the testator Somji Parpia, that the other moiety thereof belonged to his brother Dhanji Parpia, from whom it descended to his (Dhanji Parpia's) widow Meenabai, who had bequeathed it to Rohimtolla Somji; and that the mortgage included the land in Falkland Road, on which a theatre had been built, but not the building itself which stood on it. The Bank

and Dwarkadas Dharamsey also filed their written statements. The Court framed the following issues, which show the matters in dispute between the parties :—

1. What was the property or properties conveyed by the mortgage of 12th January 1899?

2. Whether the plaintiffs have a charge on the property the subject of the mortgage in the plaint mentioned?

3. Whether the Bank of Bombay were not *bona fide* transferees for value of the property mentioned in the said mortgage?

4. Whether the Bank of Bombay had notice of the charge, if any, in favour of the plaintiffs?

5. Whether the plaintiffs are entitled to the relief claimed or any part thereof?

6. Whether in any event plaintiffs have any claim to one moiety of the Bhajipala Street property subject to the said mortgage?

At the hearing of the suit before Chandavarkar J., it was contended on behalf of the younger sons that Meenabai (widow of Dhanji Parpia) had no power to bequeath the moiety of the house in Bhajipala Street, formerly belonging to Dhanji Parpia, and that such moiety descended upon the elder sons and the younger sons in equal shares as heirs of Dhanji Parpia. The learned Judge delivered his judgment on August 11, 1904 and held that only three-fourths share of the house in Bhajipala Street was bound by the appellant's mortgage and the remaining one-fourth did not form part of Somji's estate but belonged to the younger sons in their own independent right as Dhanji Parpia's heirs; that both the land in Falkland Road and the theatre standing thereon were included in the appellant's mortgage; that the younger sons had a charge on the property, the subject of the appellant's mortgage; that actual notice of the will of Somji Parpia to the Bank was not proved; that the Bank had constructive notice of that will through Meenabai's will; that according to Indian Law there was no distinction between the powers of an executor over the real property and personal estate of a testator, such as obtained in English Law; that the Bank did not know of the breach of trust on the part of the elder sons and was not a party to their fraud; and that the Bank were *bona fide* transferees for value of the properties comprised in the mortgage. On August 23, 1904 a decree was made to the effect that the Bank had a first charge; that the Bank's security com-

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prised three fourth parts of the house in Bhajipala Street, and the entirety of the lands and buildings in Falkland Road : that the younger sons were entitled to the remaining one-fourth part of the house in Bhajipala Street ; and that such right was unaffected by the mortgage ; and that they were entitled to a charge for their legacy but ranking subsequently to the Bank's security.

There were two appeals against that decree. The elder sons appealed against the decision to the effect that the mortgage included the building on the land in Falkland Road and the younger sons appealed against the decision to the effect that the mortgage had priority over their legacy and monthly allowance. The appellants filed cross objections by way of cross appeals. The appellate Court agreed with Chandavarkar J., in holding that the younger sons had a charge on the property ; that the Bank had constructive notice of the will ; and that as regards the law involved there was according to Indian Law no such distinction as there was in English Law between movable and immovable property, but that Court held *inter alia* that the elder sons were residuary legatees as well as executors of the testator's will and that the undivided moiety of the house in Bhajipala Street and the entirety of the land in Falkland Road, including the theatre thereon, formed part of the estate of the testator, and were, as such, available for the payment of the legacy of Rs 30,000 and allowances of Rs 125 per month to the younger sons, in priority to the claim thereon of the Bank under the mortgage of January 12, 1899 and of the Bank's transferee the appellant Dwarkadas Dharamsey. On March 6, 1905, a decree was accordingly made

Against that decree the Bank and its transferee Dwarkadas Dharamsey appealed to His Majesty in Council. The respondents were the younger sons and Jaffer Somji and Alladin Somji, two of the elder sons. Goolam Hoosein Somji died *pendente lite*. The respondents Jaffer Somji and Alladin Somji were not represented at the hearing of the appeal.

*Sir Robert Finlay, K. C., Mr. Levett, K. C., and the Hon. Frank Russell, K. C., for the Appellants ;—*The words "the sum of Rupees thirty thousand directed to be paid out of my above-mentioned goods and property" in Clause 6 of the will are only descriptive and create no charge on the testator's estate. For the character and property of an executor as such and his powers and assent to a legacy, reference was made to the Probate and Adminis-

tration Act (V of 1881), sections 2, 4, 90 [as substituted by section 14 of the Probate and Administration Act, (VI of 1889)], 113, 115 and 116.

[SIR ARTHUR WILSON :—Apart from the Act, the executor of a native has certain powers.]

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Mr. Levett.—The Bank obtained the mortgage in good faith and for value from the executors of the will of Somji Parpia, who were also the residuary legatees. Under the Indian law, the executors had power to dispose of, as they thought fit, all property whether movable or immovable vested in them as executors. An executor selling either leasehold or personal estate of his testator is able to give a good title to a purchaser, who purchases without any enquiry whether the debts or legacies charged on the estate are paid or not; and a purchaser or mortgagee from an executor who is also devisee, is neither entitled nor bound to inquire whether legacies or debts charged on the estate have been paid or not: *In re Whistler* (1). When the devisee of real estate charged with the payment of debts, sells, the purchaser has no need to enquire at all whether the money is applied in payment of debts, or whether it is a sale for the purpose of enabling debts to be paid: *Colyer v. Finch* (2). The Bank was entitled to believe that the mortgagors were competent to make a good title to the property mortgaged. The Bank had no notice, actual or constructive, of existence of any charge in priority to their mortgage; and if an executor, who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator: *Graham v. Drummond* (3). The Bank is, therefore, entitled to priority, and the fact that the mortgage did not purport to be made by the mortgagors in the capacity of executors but as absolute owners is immaterial: *In re Venn and Furze's Contract* (4). Reference was also made to *Lewin's Law of Trust*, p. 557 (11th edition.)

The legacy of Rs. 30,000 was to be paid in six years and the will was dated 1885. Six years would expire in 1891, and consequently at the date of the mortgage in 1899 eight years had expired from the time when the legacy was to be satisfied. That

(1) (1887) L. R. 35 Ch. D. 561, 565.

(2) (1856) 5 H. L. C. 905.

(3) (1896) L. R. 1 Ch. 968, at p. 974.

(4) (1891) L. R. 2 Ch. 101, at p. 114.

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circumstance did not exist in the case of *In re Queale's Estate* (1) relied upon by the appellate Court and distinguished the case under consideration from that case. Assuming notice of the will on the part of the Bank, the Bank after such a lapse of time was entitled to assume that the executors were acting with the consent of the legatees. Consent of the legatees would make the mortgage binding on them with the result that Bank would be entitled to priority.

Mr. Danckwerts, K. C., and *Mr. P. S. Stokes*, for the Respondents the younger sons : Both Courts in India had found that the legacy to the younger sons was a charge upon the estate of the deceased. The property bequeathed by the will of the testator to his elder sons was charged with and was moreover held by them upon trust for the payment of the legacy of Rs. 30,000 and the allowance of Rs. 125 per month. As soon as the executors discharged their functions as executors, they became trustees under the will and had no power to convey the property except as trustees. The mortgage to the Bank was therefore subject to the trust, *viz*, the payment of the legacy to the younger sons.

Both Courts in India had found that the Bank had constructive notice of the will of Somji Parpia, and therefore the Bank must be treated to have knowledge of the contents of the will and of the rights of the younger sons thereunder, and its title must be postponed to the claims of the younger sons : *Charles Corser v. Sidney Cartwright and others* (2) ; Meenabai's will, the root of the title of the house in Bhajipala Street, was deposited with the Bank. The defect in the title of the elder sons to the mortgaged property appeared upon the face of the documents of title, and the Bank was guilty of negligence in not calling for and investigating the title of the elder sons to the property comprised in the mortgage, and must be held to have taken the mortgage with notice of the will of the testator and its contents. A purchaser or mortgagee is bound to enquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire : *Wilson v. Hart* (3). A plea of purchase for valuable consideration, without notice, is no protection against an adverse claim, which the purchaser might have had notice of, by using due diligence in investigating the title : *Jackson v. Rowe* (4), *Jones v. Smith* (5), *Patman* .

(1) (1886) L. R. 17 Ir. 361, at p. 368.

(2) (1875) L. R. 7 Eng. and Ir. App. Cas. 781.

(3) (1866) L. R. 1 Ch. App. Cas. 463, at p. 467.

(4) (1836) 2 Sim. and St. 472.

(5) (1841) 1 Hare 43.

v. *Harland* (1). Reference was also made to *In re Whistler* (2). Both Courts in India have found that the mortgage was given for a pre-existing debt, due to the Bank from the elder sons, on account of money borrowed by them from the Bank. The money was borrowed, as the Bank knew, for the personal debts of the elder sons and not in respect of matters or transactions or for purposes authorised by the will of the testator. The mortgage was not, therefore, within the powers of the elder sons, as executors of the testator. The moneys intended to be secured by the mortgage were, to the knowledge of the Bank, applied to the private purposes of the executors. The Bank must be taken to have known, when it accepted the mortgage, that the legacy had not been paid. The elder sons had not right or power to create any charge upon the mortgaged properties, in priority to the claims of the younger sons in respect of their legacy. The will makes the legacy a charge upon the property, and there is, therefore, a restriction on the disposal of the property. The elder sons took the property subject to the charge, and the Bank could not acquire from them any greater interest than those sons themselves had in the property. On this part of the argument, reference was made to : *Indian Succession Act* (*X of 1865*) sections 271 and 187 ; *Shaik Moosa v. Shaik Essa* (3) ; *Probate and Administration Act* (*V of 1881*) sections 2, 4, 12 and 90 ; *In re Kirk, Kirk v. Kirk* (4) ; *Wigg v. Wigg* (5) ; and *Roper's Law of Legacies* (4th Ed.) p. 443.

Mr. Levett, K.C., in reply, further referred to *Mead v. Lord Orrery* (6) ; and *Taylor v. Hawkins* (7).

Mr. Danckwerts, K.C., (with their Lordships' permission) with reference to the cases cited in reply, referred to *In re Morgan, Pillgrem v. Pillgrem* (8) ; and *In re the Alms Corn Charity, Charity Commissioners v. Bode* (9), and contended that if the Bank had inquired, as it was bound to do, it would have known that the legacy, which was a charge, had not been paid. It must be assumed that an honest and not a false answer would have been given. *

The judgment of their Lordships was delivered by

Sir Andrew Scoble.—The facts relating to this appeal are not in dispute, and may be shortly stated.

Somji Parpia died on the 15th February 1885. He left eight

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(1) (1881) L. R. 17 Ch. D. 353.

(2) (1887) L. R. 35 Ch. D. 561, 565.

(3) (1884) L. R. 8 Bom. 241.

(4) (1882) L. R. 21 Ch. D. 435, 437.

(5) (1739) 1 Atk. 382, 383.

(6) (1745) 3 Atk. 235, at p. 241.

(7) (1802) 8 Ves. 209.

(8) (1881) L. R. 18 Ch. D. 93, at p. 102.

(9) (1901) L. R. 2 Ch. 750, at p. 762.

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sons, four by his first wife (hereafter called the elder sons) and four (hereafter called the younger sons) by his second wife Labai, who also survived him. By his will, he left all his property to his elder sons, subject to a charge of Rs. 30,000 in favour of his widow Labai and his younger sons. Both Courts in India have found that this legacy was charged upon the property in suit, and their Lordships agree with this decision.

After their father's death, the elder sons entered upon large business transactions, under the style of Somji Parpia & Co., and in the course of their business became indebted to the Bank of Bombay in respect of advances on bills drawn by the firm in Bombay upon a branch of the firm at Indore. To secure these advances, the elder sons, on the 1st September 1890, deposited certain title deeds relating to the property in suit, by way of equitable mortgage, with the Bank; and on the 12th of January 1899, the Bank obtained from them a formal mortgage of the same property, to secure the repayment of Rs. 52,000 in respect of bills then due or to become due drawn by the firm on their Indore branch. It is not disputed that this debt was a debt of the four elder sons in respect of their own business, and that the legacy to the widow and the younger sons was at the time, and still is, unsatisfied.

The property comprised in the mortgage consisted of a house in Bhajpala Street and a piece of land in the Falkland Road, in the City of Bombay, to both of which the mortgagors declared themselves to be entitled, but both of which had been specified by their father Somji Parpia, in his will, as subject to the charge of Rs. 30,000 in favour of his widow and younger sons. This will was not among the documents of title deposited with the Bank, but the root of the title to the house in Bhajpala Street, the more valuable of the two properties, was indicated in the will of Meenabai, widow of Somji Parpia's father Dhunji Parpia, which was deposited. From this it appeared that the house had been the joint property of the two brothers, and if the Bank's legal advisers had made any investigation of title, they must have enquired how Somji's share had come to the mortgagors, and in this way obtained cognizance of his will, and of the charge on this portion of his estate. But they made no enquiry, and appear to have assumed that the mortgagors were the absolute owners of the property mortgaged. It is not suggested that the mortgagors practised any concealment of the real facts of the case: and if they had been asked about their father's

will, it is to be presumed that they would have given an honest answer.

Nor is it suggested that the younger sons had any knowledge of the dealings of their elders with the Bank. But when the Bank advertised the properties for sale, they filed this suit in order to establish the priority of their charge over the mortgage to the Bank. And the only question in this appeal is, whether they are entitled to such priority.

Mr. Levett, in his able argument for the appellants, contended that, under the will of Somji Parpia, the mortgagors were residuary legatees as well as executors, and he relied upon a passage in the judgment of Romer, J., in *Graham v. Drummond* (1), in which that learned Judge says (at p. 974) :

"I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator."

But this does not dispose of the present case. Here the plaintiffs are legatees, and the distinction between creditors and legatees is well pointed out in Spence's "Equitable Jurisdiction," vol. ii., p. 376, where it is said :

"A mortgage by an executor, who is also residuary legatee, to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained. But as to creditors it is different. If a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts, if any ; therefore the mortgagee would be safe as against creditors."

Moreover, in this case, the mortgagee had constructive notice, and has only himself to thank if his position is not safe ; for had he taken the slightest pains to investigate the title of the mortgagors he must certainly have discovered the charge created by the will of Somji in favour of the widow and her sons.

It was also contended that by the terms of the will the legacy was to be made up and paid within six years after the testator's

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decease; that this period would have expired in 1891, eight years before the date of the mortgage; and that, assuming notice of the will on the part of the Bank, the Bank was entitled to assume that the executors were acting with the consent of the legatees. Lapse of time is, no doubt, a circumstance that may be taken into consideration in cases of this kind; but having regard to the fact that, in this case, two of the younger sons were still minors when the title-deeds were deposited with the Bank, and that continued possession by the elder sons was not inconsistent with the purposes of the will, their Lordships agree with the Court below in holding the rights of the parties unaffected by this circumstance.

The case of *Jure Queale's Estate* (1), bears a strong resemblance, in its facts, to that now under consideration. There the testator's son deposited with a Bank three leases to secure his own overdrawn account. The Bank dealt with him as absolute owner, and eventually proceeded to sell the leaseholds; whereupon the testator's daughters claimed to be placed on the schedule as encumbrancers in respect of unpaid legacies, and their claim was allowed. In delivering judgment, Fitz Gibbon, L. J., says:

"The Bank dealt with him (the mortgagor) as and in his capacity of an individual owner, not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes. Under such circumstances, the Bank can, in my opinion, have no better title than that which its debtor really had in the capacity, in which he was dealt with, namely, as beneficial owner, *i.e.*, as residuary legatee."

Their Lordships agree with the learned Judges of the High Court of Bombay that the claim of the first four respondents (the younger sons of Somji Parpia) must prevail over the mortgage to the Bank, and the title of its transferee, Dwarkadas Dharamsey, and they will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court of the 14th April 1905 confirmed. The appellants must pay the costs of the appeal.

Messrs Cameron, Adkin, Lee & Co.: Appellants' Solicitors.

Messrs. Rawle, Fohnstone & Co.: Solicitors for the Respondents (the younger sons.)

J. M. P.

Appeal dismissed.

PRESENT : *Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble and Sir Arthur Wilson.*

ATAR SINGH AND OTHERS

v.

THAKAR SINGH.

P. C.

1908.

June, 17
and
July, 18.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

Hindu Law—Evidence—Deed of sale of lands, suit to set aside—Ancestral lands—Onus of proof.

In a suit by the sons against their father, in a Hindu family, to set aside a sale of lands, on the ground that they were ancestral and inalienable, the onus is upon the plaintiffs to establish their case that the lands are ancestral and not self-acquired.

Where the title of the father was that of reversionary heir to the late admitted owner, A, to show that the lands are ancestral, it must be proved that they had come to A, by descent from a lineal male ancestor in the male line, through whom the plaintiffs also claim.

Appeal from a decree of the Chief Court of the Punjab, (May 26, 1903) varying a decree of the Court of the District Judge of Amritsar (March 30, 1899).

The principal question involved in the appeal was whether and to what extent a deed of sale executed by Dyal Singh the respondents' father on May 7, 1894, was binding on the respondent.

The property in suit consisted of land and a house situate in the village of Tungbala and seven houses situate in the city of Amritsar. They were at one time the property of Sirdar Dhanna Singh. On his death, they passed to his widows. On April 13, 1879, one of the widows Rajind Kuar made a gift of certain other properties to her daughter Khem Kuar, and on October 15, 1891, she made a gift of the properties in suit to Gurdit Singh, the son of Khem Kuar.

Dayal Singh was the next reversioner to Dhanna Singh's estate on the death of Rajind Kuar. He had no money and was unable to take any action to establish his rights in connection with the above and other alienations of Dhanna Singh's estate made by the widows. After various efforts ending in failure, to obtain funds by sharing the property with the lender, he on October 27, 1891, entered into an agreement with the appellants, Man Singh, Kharak Singh and Harnam Singh, by which he agreed to give them "6-16ths share of each and every alienated property, for cancellation of the alienations of which a decree may be passed by the Courts concerned, in lieu of the expenses which may be incurred by the said persons in Courts, the help which

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they may give and the labour and the time which they may expend in the prosecution of the case relating to the said alienations."

The expenses to be paid were not to include pleader's fees, as to which Dayal Singh on the the same date entered into a separate agreement with the appellant Atar Singh, by which he contracted to give Atar Singh a 3-16th share in each property recovered by the exertions of the pleader in lieu of any payment for his services.

In pursuance of those two agreements, a suit was at once brought against Gurdit Singh, and on April 26, 1893, a final decree was made by the Chief Court of the Punjab declaring that the deed of gift dated the 15th October, 1891, was inoperative after the death of Rajind Kuar.

Rajind Kuar died on April 27, 1894, and on May 7, 1894, Dayal Singh executed a deed of sale conveying a 37-64th share in the properties in suit, to the appellants and certain other members of their family:

On October 16, 1897, Thakar Singh and Keher Singh, the minor sons of Dayal Singh, by their mother acting as next friend, instituted the present suit in the Court of the District Judge of Amritsar against the appellants and Dayal Singh (Defendant No. 8). The plaint alleged that the sale of May 7, 1894 was for a fictitious price of Rs. 30,000 without any legal necessity and in fraud of the plaintiff's rights as reversioners; that the property purporting to be sold was ancestral property; and that Dayal Singh had no power to sell the same as he had no legal necessity. The plaintiffs prayed that the sale be declared not binding on the reversionary interest of the plaintiffs. Keher Singh died *pendente lite*.

Dayal Singh, impleaded as a defendant, in his written statement supported the plaintiff's case, and alleged that he had received no consideration, and had executed the deed of sale when drunk.

The appellants, the purchasers, pleaded *inter alia* that the property in suit was not ancestral, that Dayal Singh had full power of alienation, and that the alienation was for necessity.

The District Judge fixed five issues, of which it is necessary to mention only the following two for the purpose of this report:

"1. Was the property in dispute the ancestral property of defendant No. 8 and of plaintiffs?"

"2. If it was, was the alienation for full consideration a

legal necessity, and are plaintiffs bound by the agreement of the 27th October 1891 and is the same for the benefit of defendant No. 8 and of plaintiffs ? ”

The District Judge delivered his judgment on March 30, 1899. He found that the property in suit both in Tungbala and Amritsar was not ancestral estate, but fixed a sum of money as “the actual legal consideration constituting necessity,” if the property were to be found ancestral. In the result he made a decree dismissing the suit. The part of the judgment of the District Judge containing his conclusion and reasoning on the first issue, with which their Lordships agreed was as follows :

“The history of the village of Tungbala is given in the pedigree-table of the Settlement of 1865. It is said that one Dulmi, a Jat of the Tung Got, came from Hindustan some five hundred years ago, and founded a village and called it after the name of his Got, Tung. Some one hundred and twenty years after, the descendants of Jio (Jabbu?) and Banda, the sons of Dulmi, separated their shares and founded near by a new village which they called Tungpain.”

“The descendants of Malu, the son of Aji and grandson of Dulmi, went away to Fattehpur, where they acquired property.

“The history of Rakh Shikargah shows that Maharaja Kharak Singh formed a great game preserve, or hunting ground for himself out of lands that he took from the following villages ; Vairka, Tung, Nangli, Nowshera and Pandori Varaich, though how much was taken from each of the villages is not given anywhere. Somewhat latter on, Kanwar Nau Nihal Singh, the son of Maharaja Kharak Singh, destroyed the village of Tung, which had already been depopulated by its lands being included in the game preserve, and laid out a garden there. By that time Sardar Dhanna Singh, who had gained power and influence with the Sikh Darbar, applied for, and got back all the lands that plaintiffs’ counsel says were supposed to have belonged to the original village of Tungbala, before the same had been incorporated in Rakh Shikargah, as most of the original holders of the land had left the village and gone elsewhere, and he founded a new village and called it after the name of the old village. This village, it is said, is about half a mile from the site of the original village, which Prince Nau Nihal Singh had destroyed to lay out a garden. The site of the existing village is on a part of the land that was included in Rakh Shikargah. Now, while

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it is contended for plaintiffs that Sardar Dhanna Singh founded the new village on a part of the area of the old village of Tungbala, which had been included in Rakh Shikargah, and re-took all the land that had belonged to the old village, on the ground that the proprietors were dead or had gone away, and he was their collateral and heir; the defendants on the other hand, say that the new village of Tung is on entirely new land, that is, land of Rakh Shikargah, and that it is impossible to say if the site is part of the old Tung lands or not. That there may be uncertainty as regards the site being on part of the old Tung area, but as regards the lands attached to the village, there can be no identification possible, that while it is possible some little land of the original village may be included in the present village area, the great bulk of it had been acquired from the Rakh Shikargah and from certain Vaniak Khatris, Dhillon Jats and Labanas, who lived in an old deserted village near where the jail is now, that under these circumstances, Sardar Dhanna Singh may well be said to be the founder of a new village and to have acquired all the lands owned by him, which then lost their ancestral character, if any part was ancestral. It was argued by defendants' counsel that the act of Maharaja Kharak Singh in converting the old village of Tung into a hunting ground had the effect of a confiscation of all proprietary rights of the original proprietors, and that when Sardar Dhanna Singh was allowed to found a new village and a grant of lands was made to him by the Sikh Government, this was an entirely new acquisition, although in the grant made some of the old Tung lands may have been included.

It is to be regretted that I have not been able to come across any records throwing light on the refounding of the new village, showing what quantity of land of the old village was conferred on the Sardar, what out of Rakh Shikargah was connected with old Tungbala, and what by acquisition from any other village. It is conjectured that what was conferred on the Sardar must have been his own lands and the lands of his collaterals of the old Tung. As to this he had some show of right, and I think this is a reasonable conjecture. It is said that the greater part of the old Tung escheated to the British Government and became nazul property, and is now included in the area of the land attached to the town of Amritsar, and this nazul land was given away to Sardars and others who built gardens there, but Patwari Nawab Din said that old Tungbala consisted of two

patties Lashkari and Kathu ; the former was included in Amritsar and became nazul, the latter was acquired by Sardar Dhanna Singh. This may be true, as it fits in with the idea, that the Sardar would naturally like to get back what had belonged to his collaterals and ancestors, and that the Sikh Government would be willing to give back what had been confiscated, and especially when this was no longer required, and when it could be shown to have belonged to one who was a Sardar and had the favour of the Court. As I have said, this is but conjecture.

The earliest litigation connected with the estate of Sardar Dhanna Singh was in 1864, when his widow, Mussammat. Rajind Kuar, was sued by Jowahir Singh, and when Patwari Narain Mal deposed that Tungbala contained twelve wells as below :—

(1) Bajewala, (2) Dohatta, (3) Pipliwala, (4) Fattuwalla, and (5) Berwala, sunk by the Sardar himself, (6) Dinewala, (7) Takhtuwalla, and (8) Bhullarwala, sunk by Sardar Jit Singh and resumed by Maharaja Kharak Singh, and afterwards conferred on Sardar Dhanna Singh ; (9) Tarawala and (10) Mehruwala that were acquired by Sardar Dhanna Singh from Vaniak Khatris ; (11) well Birwala, acquired by the Sardar from Dhillons, and (12) well Chhambwala, which was the only old well of the old village of Tung and near which Dyal Singh, father of Thakar Singh, plaintiff, has his lands. At one time the land was held on ancestral shares in the old village of Tung, but afterwards, that is, after the founding of the present village, possession was the measure right ; for, while the other collaterals of Sardar Dhanna Singh held 126 ghumaos of land, the Sardar held 1,197 ghumaos, the share of Dyal Singh, the father of plaintiffs, being about 30 ghumaos. The present tenure of the village is bhaya-chara. The whole of the village of Tungbala belonged to Tung Jats, the descendants of Dulmi, and at the first Settlement of 1852 the only proprietors were the widows and collaterals of Sardar Dhanna Singh and such other persons as had purchased land from the widows. The whole village, therefore, practically, in Sardar Dhanna Singh's time, must have belonged solely to him, with the exception of 126 ghumaos belonging to his collaterals. I have no doubt that Sardar Dhanna Singh must have had some land descending to him from Ghaur Singh, (?) the common ancestor of Dyal Singh and of Sardar Dhanna Singh, but there is no means of ascertaining how much this was exactly. If, however, Dyal Singh's 30 ghumaos represents the correct

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apcestral share, then Sardar Dhanna Singh's must have been the same. This land could rightly be termed ancestral, so far as Thakar Singh, plaintiff is concerned.

"Again, on the printiple of Punjab Record No. 31 of 1894, land that Sardar Dhanna Singh got of his collaterals, who were absentees, would be governed by the same rules as ancestral land, and might, therefore, be classed as ancestral ; it must be held that the land that the Sardar got of his collaterals, who were absentees, was ancestral ; but unfortunately there are no records to show what was the quantity of the land, or where that land is, and so this course of reasoning, though correct, leads to no practical result as to deciding how much land is to be held as ancestral."

"Again, in the absense of reliable records, or reliable evidence showing clearly what was the area of the original Tungbala, how much of this was taken up in the Rakh Shikargah, and how much joined on to the City of Amritsar, which became nazul or Crown lands, and how much was restored back by the Sikh Raj to the Sardar, and whether this was out of Tung lands, or out of other lands included in the Rakh, or partly out of both, it appears to me to be absolutely hopeless to be able to decide that the true character of the land is ancestral so far as plaintiff, Thakar Singh, is concerned."

"A very difficult task was laid on plaintiff to perform, *viz.*, to prove positively that the land in suit was ancestral. The plaintiff had conjectures to help him, as I have already described, and very reasonable conjectures too—but after all, only conjectures—whereas absolute certainty was demanded. The nature of the Sardar's rights in the village was decidedly peculiar ; *prima facie*, they were acquired rights, that is, by self-acquisition ; for all individual rights were lost by the confiscation by the Sikh Raj, and had it not been for the Sardar, the lands then taken would have still formed part of Rakh Shikargah, as the other lands of other villages then included. Under these circumstances, I have come to the conclusion that plaintiff has failed to establish affirmatively that the land in suit is ancestral. I have come to this conclusion the more readily, as the Sardar had 1,197 ghumaos of land, and all the land has been sold by his widows, so that what the Sardar got from the common ancestor, Ghaur Singh, and from his collaterals, may well be regarded as included in that sold by the widows, and that the land now in dispute is self-acquired. It is said, with some show of reason, that the

original land of the old village of Tung is that included in Chhambwala well where all the Tung Jats have proprietary rights, so it might reasonably be supposed that the Sardar's ancestral lands were also in the lands of this well, and, if so no part of the lands of this well in dispute.

"I might record here that the defendants' counsel referred to statements made by Dyal Singh's father, Chanda Singh or Jhanda Singh, in the litigation of 1864-65, before Agha Kalb Abid Khan, Extra Assistant Commissioner, to the effect that Sardar Dhanna Singh had acquired the lands in Tungbala, and that this effectually concluded Dyal Singh and his son, Thakar Singh, from denying the fact contained in the statement. I place no weight on this, as I consider that Chanda Singh did not intend to differentiate between ancestral and self-acquired lands, but merely described what had taken place, viz., that the Sardar got back the lands that had been at one time taken by Maharaja Kharak Singh for his great hunting ground."

Against that decree the respondent appealed to the Chief Court of the Punjab, and on May 26, 1903 the Chief Court delivered its judgment and decided that the property in Tungbala was ancestral and that in Amritsar was not ancestral; and that the sum of Rs. 5480-4 was property chargeable as necessity, but of that sum Rs. 3500 had been received by the appellants. In accordance with those findings a decree was made declaring that the respondent was not affected by the deed of sale dated May 7, 1894, except to the extent of Rs. 1980, which amount remained charged on the land. The following is the material part of the judgment:

"We therefore proceed at once to what is the main point in the case and what has been the crucial point throughout, i.e., is the property in suit 'ancestral' in whole or in part in the sense in which that term is understood under the customary law. 'Ancestral property' for the purposes of this suit means property which was held by an ancestor who is the common ancestor of the parties. In this case, therefore, it would mean property held by any direct ancestor of Dyal Singh and of Dhanna Singh."

"Extract from the remarks recorded on the pedigree-tables of Mouza Tungbala at the settlement records of 1865 and 1892-93 are on the record and are printed at pages 14 and 13 of the paper book."

"There appears to be no doubt that the village was originally founded by a Tung Jat who was the common ancestor of the

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defendants, Dyal Singh and Dhanna Singh. In the pedigree-table prepared at settlement, Dyal Singh and Dhanna Singh are shown as descended from one Harji. No doubt in the Sikh times the stronger members of a family got more than their shares and we find from the remarks recorded in 1892—93 that the entire land had practically come into the hands of Dhanna Singh. Lands given up by other co-sharers and coming to Dhanna Singh in virtue of his relationship and of the fact that the land had been held by a common ancestor of the absconder and Dhanna Singh would clearly be held to be ancestral. Some portions may have been derived from other proprietors of their holdings only by purchase or simple acquisition in their absence, but the main portions would appear to have been left by the other Tung relatives to come into Dhanna Singh's hands. It is noted in the pedigree-table that 'Most of the co-sharers of the village being in straitened circumstances, absconded or absented themselves. Out of the proprietary body Sardar Dhanna Singh alone remained in possession of the entire land.' It would appear, therefore, clear that the village had been acquired practically in its entirety by Dhanna Singh in consequence of the abandonment of his relatives and collaterals. In regard to such land it has been laid down in Punjab Record No. 31 of 1894 that it should be considered ancestral. At page 88 of that judgment it is remarked, 'considering that this was a portion of the family ancestral holding, and fell to Sham Singh owing to its abandonment by a near relative we think that this portion of the estate should be held to be governed as regards alienations, by the same rule as that which applies to that part of the estate which is admittedly ancestral.' We think that this particular land is not removed from the category of ancestral property, merely because it came to Sham Singh owing to the abandonment thereof by a near relative rather than by simple inheritance. These principles are in no way traversed in the judgment in Punjab Record No. 81 of 1901 which is by a single Judge, the circumstances in that case being quite different from those in this. We think, therefore, that it must be presumed that the land in Dhanna Singh's hands before the village was evacuated in order that Kanwar Nau Nihal Singh might make a garden of it, must be considered to have been then ancestral. It is impossible to differentiate between the portions which came from relatives and co-sharers and the portions which may have, in some instances, been purchased.

"It appears, however, that Kanwar Nau Nihal Singh 'about

fifty years ago (*i.e.* about 1842) caused the village to be evacuated, for he intended planting a garden there.' These are the words on this point in the pedigree-table of 1892—93. It does not appear how far this intention was ever carried out, or whether the depopulation and evacuation went beyond the village site. It appears that when Sardar Nau Nihal Singh wished to start his garden, Sardar Dhanna Singh started another village site—abadi—on the lands of the hunting ground known as Shikargah and that abadi remained as the village site of Tungbala—the old site, which had been destroyed or depopulated to make room for the garden being included as nazul property in Amritsar. It does not appear whether Sardar Nau Nihal Singh ever intended to, or ever did, take up the cultivated lands of Tungbala which would have made a very large garden. The word used in connection with the garden is *tamir* which suggests the idea that a walled and enclosed garden was intended. The idea was not carried out, but the new abadi for Tungbala which Dhanna Singh had started remained as the abadi of Tungbala and the old one was incorporated in Amritsar. It does not appear whether or not Dhanna Singh was ever dispossessed of any part of the culturable lands; if he was, apparently, they were almost immediately restored intact. Some neighbouring villages were destroyed to make the hunting ground of Maharaja Kharak Singh, but this was not the case with Tungbala, and we are quite unable to find from the record that there was any such confiscation and break of ownership in regard to Tungbala as would bring the case within the purview of the ruling in *Ram Nundun Singh v. Fanki Koer* (1). Even if the land was taken up by Sardar Nau Nihal Singh for a short period, which is by no means established, it appears to have been restored intact, and there was no such break of continuity as to deprive the property of its ancestral character. We hold, therefore, on a full consideration of all the facts disclosed by the record that that part of the property must be classed as ancestral."

The appellants, thereupon, appealed to His Majesty in Council. But in view of the concurrent finding by the Courts in India that the houses in Amritsar were not ancestral, the appeal was confined to the consideration of the question, whether the land and house in the village of Tungbala were ancestral.

Mr. DeGruyther, K. C., for the appellants, referred to *Mayne on Hindu Law and Usage* (7th ed.) p. 343; *Sonu and others v. Loku and others* (2); and *Haidar Khan and others v.*

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(1) (1902) 1 L. R. 29 Cal. 828.

(2) (1881) P. R. p. 2.

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Jahan Khan (1), and contended that the finding of the Chief Court that the property situate in Tungbala was ancestral was erroneous both in fact and law and that the plaintiffs, as found by the District Judge, failed to prove their allegation.

The respondent did not appear.

The judgment of their Lordships was delivered by

Lord Collins :—This is an appeal from a decree of the Chief Court of the Punjab varying a decree of the District Judge of Amritsar. The suit was brought by Thakar Singh and his brother, Kehr Singh, minors, by their mother acting as next friend, to set aside a deed of sale made on the 7th May 1894 by their father Dyal Singh to the appellants and certain other persons as purchasers, on the grounds that the lands, the subject-matter of the sale, were, in the view of the Hindu law, ancestral, and that the sale was not necessary, and was for a fictitious consideration and in fraud of the rights of the plaintiffs' father, Dyal Singh, as next heir and reversioner on the death of the widow of Dhanna Singh, the deceased owner. Kehr Singh died while the suit was pending. The only question in dispute on this appeal is, whether the lands were ancestral. The District Judge has held that they were not; the Chief Court has reversed his decision and held that they were.

It is not disputed that the onus on this issue is on the plaintiffs, and it is because in the opinion of the District Judge they failed to discharge this onus that the suit was dismissed.

It is through their father, as heir of the above-named Dhanna Singh, that the plaintiffs claimed, and unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu law. Therefore, if the plaintiffs cannot show that they were not self-acquired lands in the hands of Dhanna Singh, the suit fails. Now, as the District Judge points out, there is really no evidence that the lands in question came to Dhanna Singh by descent at all. There is evidence that he acquired some lands in the district by purchase from the owners, and there is a probability that he acquired others by the abandonment of other persons who may have been collateral, and, in that way, may have become possessed of lands which, by the custom of the Punjab, would be regarded as ancestral. But there is no evidence whatever defining the boundaries of these portions of land respectively. Indeed, the

learned Judges of the Chief Court themselves say: "It is impossible to differentiate between the portions which came from relatives and co-sharers and the portions which may have, in some instances, been purchased." But it is by reason of this impossibility that the plaintiffs failed to prove their case. The learned District Judge also points out that, since the death of Dhanna Singh, large portions of the land held by him have been sold by his widow, and it is quite possible that all the ancestral land, if he had any, was embraced in these sales, and that the sale of the lands in question embraced exclusively self-acquired lands. Their Lordships agree that, when the onus lies, as it does in this case, on the plaintiffs in seeking to set aside on such grounds a solemn deed executed by their father, conjectures cannot be accepted as a substitute for proof. With the greatest respect to the Judges of the Chief Court, their Lordships venture to think that they have hardly given sufficient weight to this consideration. Their Lordships agree with the conclusion and reasoning of the learned District Judge, and will humbly advise His Majesty that the appeal be allowed and the decree of the Chief Court set aside with costs. The respondent must pay the costs of this appeal, except so far as they may have been increased by the delay which has taken place in the prosecution of the appeal.

Messrs. Watkins and Lempriere: Appellants' Solicitors.

The Respondent did not appear.

Appeal allowed.

ORIGINAL CIVIL.

SPECIAL BENCH.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

PURNA CHANDRA BYSACK

v.

GOPAL LAL SETT AND OTHERS.*

Hindu law—'Malik'—Shewabship, inheritance to—Lunatic, right of inheritance of—Dayabhaga, authority of—Dayabhaga, Chap. IV, Sec 3, V. 31, 32, 33, spurious—Rival wife's son and daughter's son,—Stridhan, Ayantuk.

Where the term 'Malik' is used in a will, its precise meaning is to be determined by the context and with reference to the other clauses of the document.

In the absence of any directions to the contrary in the will, the right of

* Original Suit No. 615 of 1904 on the Original Side of the High Court.

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inheritance to the shebaitship follows the same line as the right of inheritance to immovable property.

In Bengal, insanity at the time when the inheritance falls in, is sufficient for exclusion from the succession, even though the lunacy may not have been congenital; and where the succession to an office is in question, the duties attached to which require that the holder shall be in full possession of his senses, lunacy is undoubtedly sufficient to disqualify a person from succeeding.

The text of the Dayabhaga by Jimut Vahana cannot be regarded as in itself an authority absolutely binding without any regard to the fact whether the doctrine propounded in the text has been accepted as a true exposition of the law and has been sanctioned by usage, and without any consideration of the question whether a verse relied upon bears on its face the evidence of being spurious and an interpolation.

The Collector of Madura v. Muttu Ramalinga Sathupathy (1) followed.

Verses 32 and 33 and the words "of the rival wife" in verse 31 in Sec. III of Chap. IV of the Dayabhaga are interpolations and are spurious.

The son of a rival wife is not a preferential heir to the daughter's son in the line of succession of the *ayautuk* stridhan property of a Hindu female.

The destruction of an image does not destroy the endowment.

Suit for the construction of a will and declaration of the right to shebaitship and surplus proceeds of income.

A Special Bench heard this suit in order to avoid an appeal to this Court. The relation between the plaintiff and the 26 defendants in this suit would appear from the pedigree.* They are all the descendants of one Gobind Chand Bysack. There were numerous suits and other proceedings the full details whereof are set out in the Judgment pages 374 to 393, and it is unnecessary to repeat them here. The arguments of counsel on these facts also appear in the judgment at pages 398 to 409. The issues which were framed appear at pages 394 to 396. The chief point of law argued in this case was whether the son of a rival wife was a preferential heir to the daughter's son in the case of *ayautuka* stridhan, under the Bengal School of Hindu Law.* The arguments upon this question of law appear below.

Mr. B. Chakravarti (with Mr. A. N. Chowdhury) for the plaintiff.

Mr. R. C. Sen (with Mr. K. P. Basu) for Gopal Lal Sett.

Mr. A. C. Dutt for Gour Hari.

Mr. Ganhar Ali (with Mr. C. C. Das) for Bindubasini.

Mr. B. C. Mitter (with Mr. B. L. Mitter) for Shamlal.

Mr. A. Chowdhury for Banshidhar and Dhanukdhari.

Mr. C. R. Das for Nandalal and four others.

Mr. C. P. Hill (with Mr. S. R. Das) for Beharilal Sett.

(1) (1868) 10 W. R. P. Q. 27, 21; 12 Moo. I. A. 397.

M. Kanakmoney Dossee (predeceased.) Ratha Kristo d. 28 Mar. 1846. Tarad Chand d. 19 Jan. 1868. Makur Chander d. 24 Nov. 1906.	Mohun Chand d. Nov. 1879 Sonamoney Dossee Barshidhar died. Akur Atul Purno Gangra d. 22 Jan. '06. (Deft.) Upendralal Ashutosh (Deft.) Nogendralal (Deft.) Madhusudan Tarun Kanto (Deft.)	Nirmal d. 11 June 1900 Dhanukihari Gadadhur (Deft.) Barshidhar (Deft.) Preonath d. 28 June 1883. Ramanath—Kadambum (Deft.) Bolal Shamal Beharjal d. 31 Jan. '04 (Deft.) Nogendra Jogendra Upendra Debendra Monindra (Deft.)	Radhakant Sett / Chand Coomari d. 12 June 1846. d. 1878. Harikumar d. Ap. 1890. Bindu Basum (Deft.) Himalal d. 31 Jan. '03 (Deft.) Kamal Kristo (Deft.) Gocool (Deft.) Atul (Deft.)	Tripura Sundari d. Feb. 1841. Golsamoney Dossee d. 12 Oct. 1851. M. Surjomoney = Prembisto = M. Shiba Sundari (predeceased.) d. 1835. Joykristo d. 3 June 1860. = M. Shiba Sundari d. 13 June 1866. Uday Chand Bysack d. 8 July 1842. Lukhmoney Dossee d. 12 Nov. 1889. Monomohun Dossee d. April 1888. Rajendra Narain Bysack d. Mar. '07. Kamal Lal Sett (Deft.) Gopal Lal Sett (Deft.) Gour Hari Bysack (Deft.)
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Mr. S. C. Mukerjee for Upendra and three others.• *Mr. P. Roy Chowdhuri* for Khoka.*Mr. N. Sarkar* for Kanai Lal Sett.

Mr. B. Chakravarti—A rival wife's son is preferred to a daughter's son. See, Dayabhaga, Chapter IV, section 3, verses 31, 32, 33. The word used in the Dayabhaga is *Suta* which means son of a rival wife. He comes before a daughter's son. I question the authority of Sri Krishna as it is against the Dayabhaga. Shama Charan only follows Sri Krishna. The verse 33 is genuine and the old criticism of Sri Krishna and Achyuta are bad. See *Teencowree v. Dinonath* (1). By parity of reason, the fact that in the Chapter dealing with the issue of a lady, the rival wife's son is not mentioned, would not exclude him. The adopted son is not mentioned either. Yet the above case recognises him. See Golap Chandra Sarkar's Hindu law (2nd edition) page 327, (3rd Edition) pages 414-415. I rely on the order in Vrihaspati's text apart from verse 33. Manu says a lady who has no son of her own, but has a son by a rival wife is not called issueless. Verse 32 is not challenged as spurious. "By son is meant child of a rival wife" Golap Chandra Sarkar (3rd Edition) page 409. Where there is a conflict between Dayabhaga and Sri Krishna, Dayabhaga prevails, See *Ram Gopal v. Narain Chandra Bandopadhyaya* (2). A step-son by conferring spiritual benefit stands on the same footing as a son born of the womb. It is against Hindu sentiment that a step-son should be postponed to a daughter's son who is a stranger to the family.

Mr. C. P. Hill—On the same point *contra*. The doctrine of spiritual benefit does underlie succession to stridhan, although it is subordinated to, *firstly*, the wishes of the lady, *secondly*, the wishes of the donors when they made the gift. This accounts for the difference between succession to males and to females. That some such theory does exist is apparent. See Banerjee on Stridhan page 400. Barren and widowed daughters are admitted because they are offspring, *i.e.* the woman would desire them to take. Hence the feeling of natural affection affects the doctrine of spiritual benefit. You are to be guided not by archaic texts but by the law as accepted. See Banerjee on Stridhan page 404. That spiritual benefit is subordinated by feelings of natural affection and wishes of donor is also apparent from the devolution of different kinds of Stridhan. See Vyavasta Darpan, 262. In one respect there is unanimity, *i.e.* the issue of the woman is always

(1) (1886) 3 W. R. 49.

(2) (1905) 3 C. L. J. 15, 22.

preferred. In Dayabhaga Chapter IV, section 2, the heading given by Colebrooke is not in the Original. Section 3 deals with succession to childless woman. See the first and last verses of the section. Therefore verse 33 is out of place in section 3. Verses 9 and 10 of section 2, show the struggle of the Hindu mind to find a place for spiritual benefit. Daughter's son is expressly given a position after son's son. When you come to distant heirs, the principle of spiritual benefit is given more prominence because natural affection has no place there. Verse 34 is a continuation of verse 32. Verse 33 is interpolated between them. All the commentators put daughter's son before step-son. You cannot ignore modern usage. *Collector of Madura v. Muttu Ramalinga Sattupatty* (1). The text is not genuine. If genuine, the usage has been otherwise for 3 or 4 centuries at least.

Mr. B. C. Mitter, on the same point :—There is a conflict in the Dayabhaga itself, and the unanimous views of all the commentators explaining the conflict must be accepted.

See Dayabhaga, Chapter IV, Section 2, verses 9-12 where different kinds of daughters are indicated, special words are used, e.g. Kumari Duhita, Urha Duhita, Bandhya Duhita, Bidhaha Duhita. Verse 10 makes the position of daughters perfectly clear, and whether the doctrine of spiritual benefit is applied or that of propinquity is applied, the daughter's son prevails.

Then, see section III, verses 31-34. Jimuta Vahana is adding glosses to Vrihaspati's text. That text only refers to heirs after the husband, and therefore does not deal with the daughter or the daughter's son. Even of those who come after the husband, it merely indicates the fact of heirship and not the order of heirship. See section III, verse 38. Therefore the Dayabhaga does not intend to lay down the order of succession. In verse 31, we have "if they leave no issue." This would include widowed and barren daughters (see the different kinds of daughters in section II, verses 9-11). Therefore, if you take the verse as laying down the order of succession, then daughter's son would be postponed to widowed daughter.

In verse 33, the word is *aurasa* "putra" and "kanya" which would include barren and widowed daughter. Therefore there is a conflict.

As to the six commentators : (I) *Sri Krishna* says : Firstly, a grandson is in fact a descendant, *upadista praja*. A step-son bears the reflection of a descendant, *Atidista praja*. Therefore,

(1) (1868) 10 W. R. 17, 21.

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on ground of propinquity, a grandson ought to have preference. Secondly, (a) *pinda* offered by a daughter's son to his grandfather is participated, by his grandmother; (b) at the *parvana* *sradh*, the *pinda* offered to a father by a son is participated by the son's own mother but not by the step-mother. Thirdly, the author has already said that barren and widowed daughters are postponed to the daughter's son. Now he says that the 'aurasa children' or issue of the body come before daughter's son; therefore, barren and widowed daughters take before the daughters. Hence, there is conflict in the Dayabhaga. (II) *Moheswar* says that the text is spurious, because otherwise there is a conflict. Hence, the text of Vrihaspati does not lay down the order of succession but only indicates the fact of heirship. There is a distinction between a son and a step-son. Son is issue of the body and of the same gotra. Step-son is not issue of the body at all. A daughter's son has the element of the "issue of the body" because he is born of an issue. *Pinda* offered by a stepson to his father is not participated by his step-mother. (III) *Achyuta* says that a daughter's son is *upadista praja*. The text of Vrihaspati does not lay down the order of succession. Two other commentators (IV) *Sreenath* and (V) *Ram Bhadro* do not deal with this verse, and (VI) *Raghunandana* omits this in his *Dayatatwa*. Finally, the modern commentators are in my favour. See *Dayakrama Sangraha* Chapter 2 section 4 verses 7-8; *Macnaghten* Volume I page 39; *Shama Charan's Vyavastha Darpana* 260; *Siromani* page 590; *Banerji* pages 399-401. *Gopal Chandra Sarkar* does not give any reasons.

JUDGMENT.

C. A. V.

The judgment of the Court was as follows:

The present suit is brought for the construction of a will executed by Sremutty Bhagabutty Dassi on the 29th May 1841, for a declaration that the plaintiff is entitled to the *Shebaitship* of the endowment created by the will and to the surplus income of the endowed properties and to other reliefs for the explanation and understanding of which it is necessary to set out the following facts and the history of the proceedings which have been hitherto taken in connection with this will in the Supreme Court and afterwards in this High Court. It is necessary to set them out in some detail as apart from the construction of the will the contest between the parties is with regard to the character and effect of these proceedings.

The annexed genealogy (page 371) which is admitted as correct

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by all parties shows that one Govinda Chandra Bysack who died on the 7th February 1810 had two wives. The first Kanakmani Dassi predeceased him, leaving two sons Radhakristo Bysack and Srikisto Bysack. The plaintiff and defendants 7, 8, 9, 10, 11, 12, 13, 20, 21, 22 are descendants of this branch of the family through Radha Kristo Bysack. The members of this branch of the family all bear the family name of Bysack.

The second wife was Srimutty Bhagabutty Dassi who survived her husband and died on the 29th May 1841 after executing the will the construction of which is the subject of the present litigation. She had a family of three sons and two daughters. From the eldest son Pran Krishna are descended defendants Nos. 1 and 26 through their mother's father Uday Chahd Bysack, and defendant No. 2 through Uday's sister Mon Mohini Dasi. Defendant No. 2, of all the surviving members of this branch of the family, alone bears the family name of Bysack. Of the other two sons of Bhagabutty Dassi, Joy Kristo Bysack became a lunatic and died childless, and the other Raj Kristo Bysack died childless before the death of his mother. Both of these left widows who survived Bhagabutty but are now dead.

The eldest daughter Tripura Sundari predeceased her mother, leaving a son Radha Krishna Sett, from whom are descended defendants 4, 5, 6, 14, 15, 16, 17, 18, 19, 23, 24 and 25.

The younger daughter Golap Dassi survived her mother and her branch of the family is now represented by Bindu Basini Dassi Defendant No. 3.

All the members of the two branches of the family who are now alive have been brought on the record as parties to the present suit; defendants Nos. 25 and 26 who were left out at first having been added on objections being raised to their omission.

On the 29th May 1841, Srimati Bhagabutty Dasi who appears to have been a pious Hindu lady executed a will and died the same day. The will which has been translated by the translator of the Court, the original translation prepared for the Supreme Court being inaccurate and misleading runs as follows :

Sri Sri Durga.

Srimati Bhagabutty Dassi.

Signature-by mark x

Of Joy Gopal Siba Thakur of Anandmoye Thakurani (and)
of Gopal Lalji.

To the worthy of blessings Srijut Wooday Chund Bysack.
Executed by Srimati Bhagabutty Dassy.

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This *Hukumnama* (written order) is to the following effect. I, while in the enjoyment of sound health and in composed state of mind, give this order. You will carry on the *Seva* of Sri Sri Issar from and out of the profits (interest) of the "Company's" paper which stands in my own name and (as regards) the ancestral *Seva* of Sri Sri Issur you will carry on the *Seva* of the said *Issur* *Jiu* from and out of the profit of the garden (standing) in His (Sri Sri Issur's) name (*viz.*) the garden the village of Sinti, named Issur Gopal Lalji's garden, purchased by ancestor. You are to remain as *Malik* of all *Sevas*. You will carry on the *Seva* of the aforesaid Issur Thakurani in concert with your step-mother Sreemutty Siva Sundari Dassi according to the existing arrangement of the *Sewa*. Furthermore, I have purchased a house at Chowringhee *benami* in the name of Srijut Radha Kanta Sett. From and out of the profits of these two houses (namely) from the profits of the said house from which the *Seva* of Sri Sri *Issuri* is being carried on and (from the profits of) the house at Pathuriaghata given by my husband, the *Seva* will be carried on. You will distribute the remaining amount of profits in equal shares amongst these three persons (namely) Srijut Radha Kanta Sett, Srimati Golapmoni and Srimati Manmohini. You will make payment to the Srijut Ramjoy Bhattacharjya in the way in which it is made to him for the *Seva* from and out of the balance of the interest obtained from the Company's paper standing in my own name that may be left after performance of the *Seva* of *Issur*, and you will carry on the *Seva* of *Issur* at the *Ghat* on the side of the river Bhagirattee according to the existing provision and you will make payment from and out of (the interest on) the said Company's paper. I have (to pay) costs in Court and debts. You will make payments to the persons mentioned below. Further, from and out of the profits of the two *Baitakhana* houses which have been purchased in your name from Srijut Radha Krishna Basak, the *ponja* of *Issuri Saradea* will be performed. Besides, you will pay to Srijut Jagabandhu Mukhopadhyaya a sum of Company's Rs. 100 (one hundred rupees), for the construction of a house. You as executor will perform the abovementioned duties, which I entrust you with. To the above effect I execute this Will. Finis. Dated the 17th Jaista 1248 Sal (corresponding to) the 29th May 1841.

Witnesses.

Sri Srikrishna Basak.

Sri Ramsunder Basak.

Details of debts.

	Rs.
Srimati Krishna Kumari Dassi ...	1,500
" Hara Sundary Dassi ...	2,300
" Wooma Sundary Dassi ...	300
" Apurbamani Dassi ...	300
" Siba Sundary Dassi ...	300
" Manmohini Dassi ...	550
Sri Khetter Narain Basak ...	100
Debt due to the Union Bank one draft ...	2,660

Co's. Rs. 8,010

A sum of Rupees Eight Thousand and ten only.

Witnesses.

Sri Srikrishna Basak

Sri Ram Sundar Basak

At the time of Bhaggobutty's death her eldest son Prankrishta was dead. He left a widow Shibo Sundary who was his second wife, and a son, Uday Chand Bysack, and a daughter Mon Mohini Dasi, who were his children by his first wife.

The second son of Bhaggobutty, Joy Krishta Bysack, survived her, but he had become a lunatic in 1821 and had been declared to be so on 7th January 1840 after the issue of a Commission of inquiry.

Bhaggobutty's third son Raj Kristo predeceased her, but his widow Jamuna Dasi was alive at the time of her death.

Neither of these two sons had any children.

Tripura Sundari Dassi, the eldest daughter, had predeceased Bhaggobutty leaving a son Radha Kanta Sett.

The younger daughter Golapmoni Dassi was alive, but was the mother of daughters only.

It is not denied before us that the property covered by the will executed by Bhaggobutty Dassi was her *Ayautuk Stridhan*, a contention to the contrary which was at first raised by Kanai Lal Sett defendant No. 26 in his written statement not having been seriously pressed. It is also not seriously contested that the will covered all the *Stridhan* property of which Bhaggobutty Dassi was possessed at the time of her death. This was in fact found to be the case by the Supreme Court in 1857.

Under the terms of the will, Bhaggobutty Dassi who appears

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to have been a highly pious Hindu lady provided for defraying the expenses necessary for carrying on the worship of the family idols out of the income of her property, which consisted of a sum of money invested in Government Promissory Notes and of certain houses and other landed property. She appropriated the profits of the different properties to defraying in the first instance the cost of carrying on the worship of the different idols, and specified in the case of two of the properties, namely, the house in Chowringhee and the house in Pathuriaghatta, that the profits derived from them were in the first instance to be applied to the worship of the idol, Ananda Moyi Thakurani. She also named the persons amongst whom the surplus was to be divided. They were, Radha Kanta Sett son of her daughter Tripura Sundari, Golapmoni Dassi her youngest daughter, and Mon Mohini Dassi the daughter of her eldest son Pran Kristo Bysack. She provided that out of other properties legacies were to be paid to certain specified persons and her debts including costs of litigation were to be discharged. She constituted her grandson (son's son) Uday Chand Bysack the *Malik* of the *Sheba* and directed that he could conduct the worship of the idol Ananda Moyee in agreement with his step-mother Siba Sundari. She also appointed him executor of her will in order that he might carry out its provisions.

Uday Chand Bysack survived his grand mother only a little over a year, and died on the 8th July 1842, leaving as his sole child an infant daughter, Lakshi Moni Dasi, born in July 1841.

Before his death, Uday Chand executed a will on the 2nd July, 1842. Under this will he appointed as his executors Srijut Rama Nath Tagore and Srijut Madan Mohun Chatterjee. He directed his executors to make due provision out of his estate for the maintenance and marriage of his infant daughter. He also directed his executors to provide funds out of his estate to carry on as before the worship of the idols Ananda Moyee Thakurani, Joy Gopal Jiu and Shiv Thakur which had been established by his grandmother, and also gave them liberty to increase the allowance for the *sheba*. He also directed that if his daughter bore any sons, those sons on attaining full age should take the whole of his property movable and immovable from his executors in equal shares, and should become *shebait*s of the idol, but that if his daughter bore no sons then two good and well-disposed persons should be appointed trustees (*shebait*s) by

the executors, and that on the death or resignation of one of the persons so appointed as trustees the survivor should have power to appoint a person as trustee in his place. He also left certain bequests and legacies.

The executor's seem to have taken charge of the properties without objection being raised by any other members of the family and to have made arrangements for defraying the worship of the idols.

On the 12th June 1846 Radha Kanta Sett, the grandson of Bhaggobutty Dassee by her daughter Tripura Sundary died leaving two sons Prio Nath Sett and Rama Nath Sett. Before his death he executed a will by which he appointed his widow Shama Sundary Dassee and two persons Ramanath Bysack and Madhab Chandra Bysack his executors. Shama Sundari along took out probate.

It has been mentioned already that Kanakmoni Dassee the elder wife of Govinda Chandra Bysack predeceased him, leaving one son surviving her, Radha Kristo Bysack. Radha Kristo died on the 25th March 1846 leaving him surviving three sons Tarini Chand Bysack, Mohan Chand Bysack and Nirmal Chand Bysack.

On the 27th August 1846, Golap Moni Dassee the sole surviving daughter of Bhaggobutty Dassee filed a bill of complaint, or as it is also described, an equity suit in the Supreme Court of Calcutta. In that suit she made defendants Ramanath Tagore and Madan Mohan Chatterje the executors under the will of Udoy Chand Bysack, Mr. Robert O'Dowda, the committee of Joy Kristo Bysack the lunatic son of Bhaggobutty Dassee, Monmohini Dassee the sister of Udoy Chand and granddaughter (son's daughter) of Bhaggobutty, Jamoona Dassee the widow of Rajkristo Bysack deceased the third son of Bhaggobutty Dassee, and Shama Sundary the widow of Radha Kanto Sett the grandson (daughter's son) of Bhaggobutty who was also an executrix appointed under her husband's will, as well also as Ramanath Bysack and Madhab Chandra Bysack, the executors appointed by Radha Kanta Sett in his will. In fact in that suit all the then surviving members of Bhaggobutty's branch of the family were made defendants. The plaint, after first describing the family history up to the death of Bhaggobutty Dassee and stating the fact that she died possessed of certain *stridhan* property, proceeds to recite that Bhaggobutty Dassee executed a will on the 29th May 1841 and sets out the will *in extenso*. It then asks for a full discovery of all the property of which Bhaggobutty died possessed.

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It then proceeds to set out the family history after the death of Bhaggobutty Dasee pointing out how the property left by her had come into the hands of the executors of Udoy Chand, and seeks a discovery of the charges and expenses necessary for carrying on the worship of the idols provided for in the will of Bhaggobutty Dasee. It then proceeds to set out that the oratrix Golapmoni Dasee as the sole surviving daughter of Bhaggobutty Dasee is entitled to all the *stridhan* property left by Bhaggobutty which did not pass under the will executed by her. It points out that there is no residuary clause in the will and therefore the oratrix is as heir under the Hindu Law entitled to any residue that may be found to exist. The right of Bhaggobutty as a Hindu female to make an absolute disposition of her immovable *stridhan* property is denied, and the validity of the endowment and bequest made by the will is disputed. It alleges that Bhaggobutty died possessed of properties in excess of those covered by the will, and in order to ascertain whether this was so or not, seeks for an order on the defendants to answer 22 interrogatories which are set out. It prays that the rights of all the parties interested under the will of Bhaggobutty may be ascertained and declared, that the several religious and charitable bequests and bequests of the surplus under the will may be declared to be void and of no effect, that the oratrix be declared entitled as sole heir to succeed to all the properties of Bhaggobutty Dasee not covered by the will, that the Master of the Court be directed to take an account of all the properties belonging to the estate at the time of Bhaggobutty's death and of the income derived from them since her death, and after "in a due course of administration" deducting necessary expenses to pay funeral expenses and to pay off debts and also to pay legacies, the balance may be ascertained and paid to the oratrix, that in the meantime a Receiver to the estate be appointed, that the executors under the will of Udoy Chand, as derivative executors to the estate of Bhaggobutty Dasee, be directed to bring the estate of Bhaggobutty into Court, and be restrained by an injunction from defraying any further charges and expenses on the several charitable and religious bequests referred to in the will or from alienating any of the property included in the estate of Bhaggobutty Dasee.

On the 28th October 1846, the executors of Radha Kanto Sett and Mon Mohini Dassi put in a joint written answer. While admitting most of the statements of fact set out in the Bill of complaint they disclaimed all knowledge of the amount or value

of the property left by Bhaggobutty Dasee at her death, or what amount had been spent on carrying on the worship of the idols. They denied that they had received from Uday any share of the surplus from the rents of the two houses, one in Chowringhee and the other in Pathuriaghata as bequeathed to them under the terms of the will. They submitted to the decision of the court the determination of the questions raised in the 17th and 22nd interrogatories, whether the complainant was the sole heir of Bhaggobutty and, as such, entitled to the whole or the residue of her estate, and whether the will executed by Bhaggobutty was a good and valid disposition of all her property. They denied generally they were necessary parties to the suit and Madan Chandra Bysack set up a further ground that he was not a necessary party as he had neither taken out probate of the will of Radha Kanto Sett nor had intermeddled with his estate. •

On the 13th March 1847, Romanath Tagore and Madan Mohun Chatterjee executors under the will of Uday Chand put in their written statement. In this, while admitting generally the truth of the facts as set out in the bill of complaint they say Uday Chand after succeeding to the property of Bhaggobutty Dasee under her will so mixed up her property with his own that they, his executors, cannot distinguish the property which came to him under the will from his other property, except in so far as the property is described in the will itself; they left it to the Court to decide whether the complainant as a sonless widow was entitled as sole heir to succeed to the *Stridhan* property of Bhaggobutty Dasee, but in reply to the 22nd interrogatory they asserted that the will of Bhaggobutty on a true construction was a good and valid testamentary disposition of all the property of which she died possessed and that no part of the property was left undisposed of. In reply to the 16th interrogatory they admitted that so far as they were aware Uday during his lifetime had not paid to the complainant or to Monmohini or to Radha Kanto Sett the surplus profits, if any, of the two homesteads, namely, the one in Chowringhee and the other in Pathuriaghata.

On the 7th May 1847, Jamoona Dasee the widow of Raj Kristo Bysack the third son of Bhaggobutty Dasee died leaving no children.

On the 10th September 1847, a decree was passed by the Supreme Court referring the case to the Master of the Court for enquiry and for report, (1) what property movable and immovable Bhaggobutty Dasee died possessed of, and from what sources

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it came to her, (2) what portion of these properties came into the possession of Uday Chand as executor under her will, and what passed afterwards to his executors, (3) what part, if any, of the properties were disposed of by Uday during his lifetime or by his executors after his death, and what had become of the proceeds, (4) to take an account of the outstanding personal estate and effects of Bhaggobutty the testatrix and of her debts and funeral expenses, and (5) to advertise the creditors of the estate to come in and present their claims before a fixed date and to prove their debts.

The decree then gives the following directions, which are important for the purpose of this case *viz.*, that the master is (6) to enquire and report what religious ceremonies had been performed during the lifetime of the testatrix and what had been continued after her death, and (7) also "to enquire and report who would be a fit and proper person or persons to execute and perform such of the religious trusts in the said will mentioned as are still capable of being performed."

The case was before the Master from the 10th September 1847 to the 10th November 1857 when he submitted his report.

It is not necessary to go through all the proceedings before this officer which appear to have been very protracted. The following facts in connection with those proceedings are, however, important as bearing on the arguments which have been advanced before us by the different parties.

On the 4th February 1848, the executor of the estate of Monmohini Dasee through his solicitor stated that he did not intend to attend the proceedings any more as he was interested only in a share of the surplus profits of the two houses in Chowringhee and Pathuriaghatta.

On the 18th November 1848, the Master issued notice to the committee of the lunatic Joy Kristo to attend the proceedings as representing the lunatic.

On the 3rd June 1850, Joy Kristo the lunatic died leaving no children but a widow Harasundary.

On the 12th October 1851, the complainant Golapmoney Dasee died, leaving three daughters, Chand Kumari, Hara Kumari and Kristo Kumari. After her death, nobody appears to have taken any interest on her behalf in the proceedings, which were dismissed on the 30th June 1853.

On the 9th March 1854, however, they were revived on an application made on behalf of her daughters Chand Kumari and

Hara Kumari, the third daughter Kristo Kumari having in the meantime died.

On the 1st February 1855, the Master directed that Lukshi-money Dasse daughter of Udo Chand should be made a party, as representative of her father, and on the 8th March 1855 her husband Nabin Kissun Sett was appointed guardian *ad litem* for her in those proceedings, and he through his attorney was present at the rest of the meetings before the Master.

The report of the Master of the 10th November 1857 was to the following effect.

After setting out the real (or immovable) properties left by the testatrix Bhaggobutty Dasse, all of which came into the hands of Udo Chand after her death under her will and afterwards into the hands of his executors, he gives an account of the personal property or movables which also came into the possession of the same persons, and finds that Rupees 5396 10 annas is due to the estate of Bhaggobutty from the executors of Udo, and gives a list of the jewels and ornaments which were dedicated by the testatrix to the idols Ananda Moyee Thakurani and Sri Gopal Jiu, and which, since her death, had come into the hands of Udo and his executors. He reported that the will covered the whole of the property of the testatrix, that it was her *stridhan* which she had acquired at different times after her nuptials according to the usages and customs of the Hindus by divers gifts, donations and presents from her husband and that she had full power to dispose of it all by her will.

Dealing with the question of the religious ceremonies and the arrangements to be made for their continuance, he reported that during her life time, Bhaggobutty Dasse performed all the ceremonies at an expense of Rs. 3271-1 annually, and that since her death Siba Sundari Dasse, the step-mother of Udo Chand, had been performing the same religious ceremonies both during Udo Chand's life-time and since his death and had received the sum of Rupees two thousand three hundred and eighty, three annas, eleven pies annually from Udo Chand, and after his death from his executors, to cover the expenses of carrying them on, and he found "that the said Srimutty Siba Sundari Dasse the step-mother of the said Udo Chand Bysack is a fit and proper person to execute, perform, and keep up, all the religious trusts in the said will of the said testatrix mentioned," and that all the ceremonies were still capable of being performed. He further found that the profits of the real property and the interest on

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the sum of Rupees fifty-three thousand nine hundred and sixty one, anna one, in Company's promissory notes should be paid monthly to Siba Sundari, and the jewellery should be made over to her. He further found that under her will Bhaggobutty Dassee had directed that the surplus out of the profits of the two houses in Chowringhee and Pathuriaghata remaining after performance of worship of Ananda Moyee Thakurani should be divided equally among Radha Kanta Sett husband of the defendant Syama Sundari Dassee, Golap Moni Dassee (mother of the defendants Chand Kumari and Hara Kumari) and the defendant Monmohini Dassee, that Rs. 4,266-12-3 was due on account of such surplus from the executors of Uday Chand, that that sum was included in the Rs. 53961-10 due by them to the estate and that Radha Kanta Sett had received Rs. 425 and Monmohini Rs. 2283 annas 13 and pies 4 on account of their shares in the surplus.

The report was laid before the Chief Justice and two Judges of the Supreme Court, and on the 14th December 1857 a decree was passed. After setting out the substance of the order of the Court of the 10th September 1847 and the report of the Master, the decree notices that the cause had been heard and debated in the presence of counsel for all the parties excepting (1) Jamoona Dassee, after whose death her representatives had not been brought on the record (2) Monmohini Dassee, a legatee under the will, and (3) the executrix and executors to the estate of Radha Kanta Sett also a legatee under this will, his widow Shama Sundari and Ramanath Bysack, all of whom through their solicitors expressly asked the Master not to serve them with further summons to attend proceedings before him. The decree then proceeds to declare that the real properties mentioned in the schedule attached to the report of the Master and belonging to the estate of the testatrix are in the possession of the executors of Uday Chand, who are derivative executors of the estate of the testatrix, together with the sum of Rs. 53961 in Company's paper; and decrees that they do within 12 months pay over to the Accountant General of the Court the sum of Rs 53,691 to be placed to the credit of the causes; and directs that a reference be made to the Master to take an account of all sums received by the two executors since 1st Kartic 1263. The decree then proceeds to declare Shiba Sundari Dassee to be a fit and proper person to execute and perform and keep up all the religious trusts in the will of Bhaggobutty Dassee mentioned, out of the profits of the real

estate and the interest on the Rs. 53,691 ; and orders the two executors to deliver over before the 15th March 1858 to Shiba Sundari Dassee all the jewels, gold and silver ornaments, and utensils, which were dedicated by Bhaggobutty Dassee for the use of the idols. Further, the decree declares that the surplus of the produce of the house in Chowringhee and of the house in Pathuriaghata, left after defraying the expenses of the worship of Ananda Moyee Thakurani, should be paid, one third to the representatives of Radhakanta Sett, one third to the representatives of Golap Moni Dassee, and the remaining one third to Monmohini Dassee during her life time *and to her representatives after her death*. The decree further directs that it be referred to the Master to report what would be a sufficient sum to be set apart out of the proceeds of the houses in Chowringhee and Pathuriaghata for the worship of Srigopal Jiu (apparently Ananda Moyee Thakurani is meant) and to appoint a fit and proper person to be receiver of the rents of the real property belonging to the estate ; and orders that the receiver so appointed shall after deducting his commission and charges pay over the balance to Shiba Sundari Dassee "to be applied in the performance of the trusts of the will of Bhaggobutty Dassee." The decree further declares that there is due to Chand Kumari and Haro Kumari daughters of Golap Mani as, her one-third share of the surplus profits of the house in Chowringhee and Pathuriaghata the sum of Rs. 1,422-4-1 and to Shamasundary and the executors of the estate of Radha Kanta Sett Rs. 997-4-1, and that Rs. 361-9-6 has been paid over to Monmohini Dassee as her share of the surplus. Lastly, it directs the Accountant General to pay the costs of the suit out of the Rs. 53691 in his hands, then to pay the sums due to the persons just mentioned as their shares of the surplus, and lastly, to pay the interest on the balance remaining in his hands, monthly to Shiba Sundary Dassee *during her natural life till further orders of the Court* to be applied in the performance of the trusts of the will of Bhaggobutty Dassee. It concludes with the reservation that "the decree is to be without prejudice to the right if any of Haro Soondary Dassee who has not been served with notice of the hearing" ; Haro Sundary it is to be observed was the widow of the lunatic Joy Kristo Bysack.

7 A month after the passing of the decree and before it could be carried into effect Shiba Sundary Dassee died, on the 14th January 1858.

Thereafter the executors to Udoy's estate applied to the

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Court to appoint a fit and proper person to execute, perform and keep up, all the religious trusts mentioned in the will of Bhaggobutty Dasee, and on the 5th June 1858 an order was passed that a reference should be made to the Master to enquire and report who is a fit and proper person. The referring order was in fact drawn up on the 3rd August 1858 and in addition to the above directed the Master to ascertain what amounts Udoy's executors had advanced to Shiba Sundari for the purpose of performing the *sheba* of the idols, and then to credit to them those sums as payment of the interest due from them on the Rs 53,691.

Meetings were held before the Master on the 8th and 13th September 1858, and the Master directed that notices of the proceedings should be given to every one interested in the endowment whether entitled to rank as *shebais* or not, and in accordance with that direction notices were issued to sixteen persons. Hara-kumari and her sister and the executors of Udoy Chand were already parties in the proceedings. The sixteen persons included every member of the family of Gobinda Chandra Bysack then alive belonging to the branches created by the children of his two wives. In those notices it was stated that the Master would consider the right of all parties claiming to act as trustees in the performance of the religious trusts created by the will of Bhaggobutty Dasee.

On the 23rd September 1858 the question was raised whether the succession under the will opened on the death of Bhaggobutty Dasee or on the death of the trustees. The Master, however, so far as his notes show, did not attempt to decide this question but states his conclusion as follows. "Considering the pedigree and the list of persons claiming before me, I am of opinion that of these persons the most proper are, if duly vouched for personally by people who are well acquainted with them, Tarini, Mohon and Nirmal". These three persons were grandsons (son's sons) of the co-wife of Bhaggobutty.

On the 11th April 1859, the Master Mr. Macnaghten drew up a draft report in which after considering the rights of the parties he appears to have held that the succession opened on the death of the last trustee and that the grandsons of the co-wife Tarini, Mohan and Nirmal were the preferential heirs. In the report which was submitted on the 15th April 1859 by Mr. Cochrane who had in the meantime succeeded Mr. Macnaghten as Master, it was simply stated that Tarini Charan

Bysack, Mohan Chand Bysack and Nirmal Chand Bysack were fit and proper persons to execute, keep up and perform all the religious trusts.

On the 7th June 1859, the report was laid before the Court, and Counsel for the parties were heard. The report was absolutely confirmed, and the Court declared that Tarini, Mohan and Nirmal named in the report were fit and proper persons to execute, perform, and keep up all the religious trusts mentioned in the will of Bhaggobutty Dasse. Order was also passed on the Receiver to hand over the jewellery and utensils belonging to the idols to those three persons and to pay them the balance of the profits of the real property monthly *during their natural lives or until the further order of the Court*. It was further directed that the order was passed without prejudice to the rights, if any, which the persons declared entitled to the surplus profits of the houses in Chowringhee and Pathuriaghatta under the decree of the 14th December 1857 might have therein.

On the 6th July 1860, the Registrar of the Court reported what sum was due to the estate from Ramanath Tagore and Madan Mohan Chatterjee, executors of Uday's estate, after taking an account of the sums received by them on account of the profits of the property covered by the will and of the disbursements made to Uday and by them under the terms of the will. On the 18th February 1861, they were both relieved from their duties as executors to Uday Chand's estate.

On the 1st September 1876, Gopal Lal Sett, defendant No. 1 in the present suit, instituted a suit No. 560 of 1876 in the High Court at Calcutta which had succeeded to the old Supreme Court on its abolition, against Tarini Charan Bysack, Mohan Chand Bysack, and Nirmal Chand Bysack who under the order of the Supreme Court of the 7th June 1859, had assumed the management of the endowed properties. Kanai Lal Sett, his brother, defendant 26 in the present suit, was made a *proforma* defendant. Kanai Lal Sett was born on the 6th October 1856, and the plaintiff on the 22nd January 1859. The plaint of that suit after setting out all the previous history of the proceedings in connection with the will of Bhaggobutty Dasse proceeded in para 25 to state that "under the circumstances aforesaid, plaintiff submits that he is entitled to conduct as shebait the sheba of the religious trusts constituted by the said Bhaggobutty Dasse, the defendant Kanai Lal Sett (his brother) being entitled to act as co-shebait, and the plaintiff further submits that as such shebait

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or co-shebait he is entitled to the custody of the properties dedicated to the said shebas." And in para. 27 it states "The plaintiff submits that no adjudication was ever made or sought to be made as to the right of shebait in the suits hereinbefore-mentioned and he further submits that no adjudication of his rights was possible in the said suits as he was not a party thereto." The plaint goes on to state that Tarini Charan, Mohan Chand and Nirmal Chand pretended to be owners of the trust properties, though in fact they were only trustees temporarily appointed, and prayed that the rights of the plaintiffs and of Kanai Lal to the shebaitship be ascertained and declared, and that Tarini, Mohan and Nirmal, be directed to make over to them the idol's jewels and ornaments and to file an account of the trust funds from the 7th June 1859 up to the date of suit, and that all funds &c., due to the trust properties be handed over to the plaintiff.

Tarini Charan, Mohan Chand and Nirmal Chand filed a written statement in which *inter alia* they alleged that the appointment made, under the will of Bhaggobutty Dasse, of Uday Chand as manager of the trust properties for the purpose of having the religious ceremonies of the idols duly performed was merely a personal one, that no member of the family was entitled directly to worship the idols, but that under the will Uday Chand was empowered simply to provide for and superintend the performance of the worship, that he acquired no heritable right or title to the endowed properties, that he had no power under his will to appoint Gopal Lal Sett and Kanai Lal Sett his grandsons, unborn at the time of his death, as shebait of the endowed property, that Uday Chand's family was fully represented in the proceedings before the Supreme Court which terminated with the order of the 7th June 1859, by which the three defendants were appointed shebait of the idols, that they the defendants left it to the Court to determine whether their appointment was temporary or not, and they denied the right of Gopal Lal Sett and Kanai Lal Sett to the shebaitship as claimed in the 25th and 26th paras. of Gopal Lal's plaint.

The suit was dismissed on the 28th May 1877 on the ground that the plaintiff had no *locus standi* to sue the defendants. It was held that the plaintiff claimed the right to the shebaitship under the will of Uday Chand, that at the time of Uday Chand's death neither plaintiff nor his brother were born, their mother Lakhimoni being then only a year old, that no bequest to a person

unborn at the time of the testator's death could take effect, (and in support of this view the case of *Tagore v. Tagore* (1) was referred to), and therefore that under the will, Gopal Lal and Kanai Lal took nothing. Lakhimoni was the sole heiress of Uday Chand and stood between the plaintiff Gopal Lal and his brother Kanai Lal and the succession. It was stated that though Lakhimoni was willing to relinquish her rights in favour of her sons, it was too late at that stage to allow her to do so. It was further held that as Lakhimoni had been a party to the previous litigation, Kanai Lal was bound by it, and that it was doubtful whether, though Gopal Lal was not a party, his interests were not sufficiently represented though he was born only six months before the final decree of the 7th June 1859.

Mohan Chand Bysack died in November 1879, and after notice had been given to the surviving parties in the previous litigation and after hearing Counsel, the High Court on the 1st March 1880 passed an order recording the fact of his death and directing that the Receiver do pay to Tarini Charan and Nirmal Chand, as the surviving trustees, the rents and profits of the real properties belonging to the endowment in his hands and ordering the Comptroller General of Accounts &c. to pay to them the interests on the monies belonging to the same estate which were in deposit.

On the 16th September 1881, Hara Kumari Dassee daughter of Golapmoni Dassee instituted a suit against Tarini Charan and Nirmal Chand, making also defendants Monmohini Dassee, the grand-daughter of Bhaggobutty Dassee and sister of Uday Chand, and Pria Nath Sett and Rama Nath Sett, the great-grandsons of Bhaggobutty Dassee, sons of Radha Kanto Sett. The suit was for her share in the surplus profits of the two houses in Chowringhee and Pathuriaghatta which had been left to them by Bhaggobutty in her will, the *proforma* defendants being co-legatees under the same bequest; she further claimed as one of the beneficiaries under the trust created by the will of Bhaggobutty to be entitled to call for an account from Tarini Charan and Nirmal Chand of their dealings with the properties. It was prayed that the suit be treated as supplemental to the previous suit brought by Golapmoni and Chand Kumari. There was also a prayer for the removal of Tarini Charan and Nirmal Chand from their office as trustees.

A written statement was filed by Tarini Charan and Nirmal Chand in which for the first time in para. 6 a claim is put forward

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(1) (1872) 9 B. L. R. 377; L. R. I. A. Sup. 47; 18 W. R. 359.

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on their behalf to be heirs-at-law of Bhaggobutty Dassee as grandsons of the co-wife. It is not distinctly stated, however, over what other heirs they had a preferential right. They denied that there was any surplus from the profits of the two houses to which the plaintiff could lay any claim.

The *pro forma* defendants supported the plaintiff.

On the 23rd May 1882, a decree was granted by Wilson J. in favour of the plaintiff. It was ordered that the suit should be treated as supplemental to the previous suit in the Supreme Court. The trustees were ordered to render accounts and to pay to the plaintiff any share of the surplus out of the profits of the two houses which might be found due. On the 22nd July 1882 an order was passed on the defendants to file a state of facts and that the enquiry be referred to the Registrar.

On the 19th January 1886, Tarini Chand died, and on the 30th January 1886 an order was passed apparently by the Registrar substituting for him his son Nakoor Chand Bysack as his representative in the suit.

On the 8th or 11th May 1885, one of the idols was stolen and was afterwards discovered in a disfigured and broken state. It has been suggested, but the suggestion has not been pressed, that this destruction of the idol had the effect of converting into secular property the property which had been endowed for the worship of the idol. If authority were wanted to controvert this contention, it is to be found in Chapter XIV of page 441 of the Treatise on Hindu law by Golap Chandra Sarkar Sastri and the Texts 7 to 10 given in the same Chapter to which he refers. The image or idol is merely the symbol of the Deity, and the object of worship is not the image but the God believed to be manifest in the image for the benefit of the worshipper who cannot conceive or think of the Deity without the aid of a perceptible form on which he may fix his mind and concentrate his attention for the purpose of meditation. If the image be cracked, broken, mutilated or lost, it may be substituted by a new one duly consecrated. The argument has not however been seriously pressed.

On the 19th July 1886, an application made by Nirmal Chand the sole surviving trustee for payment of the profit of the trust property to him alone was dismissed.

On the 12th August 1886, on an application by Hara Kumari Dassee after notice to Nirmal Chand, Nakoor Chand and others, and after hearing counsel, an order was passed directing that a

reference be made to the Registrar to enquire and report who would be a fit and proper person to be associated with Nirmal in the execution and performance of the religious trusts contained in the will of Bhaggobutty Dassee.

Proceedings seem to have gone on before the Registrar till the 6th March 1887 when he recorded a note to the effect that Nakoor Chunder Bysack was a fit person to be appointed with Nirmal as trustee. On the 29th March 1888, Lakhimoni was on her application made a party to the proceedings. On the 29th March 1888, the Registrar recorded a fresh note to the same effect as that of the 6th November 1887, and on the 15th September 1888 the Registrar submitted a report to the effect that Nakoor Chander Bysack was a fit and proper person to be associated with Nirmal Chand as trustee subject to his giving security. On the 6th December 1888, the report was laid before the Court and discharged, and a fresh enquiry was ordered.

From the minute of the learned Judge, Trevelyan J., who passed this order, which does not appear to have been recorded quite correctly, it seems that he was of opinion that the Supreme Court by its order of the 7th June 1859 did not intend to confine the shebaitship to the descendants of the co-wife of Bhaggobutty Dassee, as the Registrar in making his selection seemed to believe, and a fresh order was issued to the Registrar "to select from all the members of the family that are descendants of Gobind Chand Bysack either by Bhaggobutty or Kanakmani."

On the 7th June 1889, the Registrar made a fresh report to the effect that Lakhimonee Dassee, the daughter of Uday Chand, was a fit person to be associated with Nirmal Chand as trustee, and on the 29th July 1889 it was ordered by the Court that Lakhimonee Dassee be appointed a trustee. It was further ordered that all the costs of the parties were to be paid out of the trust properties and funds.

On the 11th November 1889, Lakhimonee Dassee died, and on the 9th December 1889, a fresh reference was ordered by the Court to the Registrar to enquire and report who was a fit and proper person to be associated with Nirmal Chand as trustee.

On the 3rd April 1890, Hara Kumari died.

On the 6th May 1891, the enquiry before the Registrar commenced. On the 27th June 1891, he recorded a note, and on the 16th July 1891, he submitted a report recommending that Gopal Lal Sett, one of the grandsons of Uday Chand, was a fit person to be associated with Nirmal Chand as trustee. On the

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23rd November 1891, the report was confirmed, and Gopal Lal Sett (defendant No. 1 in this suit) was appointed trustee of the endowment in association with Nirmal Chand. It seems however that from that date up to the present time, Gopal Lal has never discharged any of his duties as trustee.

The following dates are also important for the purposes of this suit.

On the 18th June 1896, Haro Sundari, the widow of the lunatic Joy Krishto Bysack died.

On the 11th June 1900, Nirmal Chand the last of the three trustees appointed by the Supreme Court died. Since his death, no one has been looking after the trust.

On the 1st. August 1904, the present suit was filed, and on the 24th November 1905, the original plaintiff Purna Chandra Bysack, one of the grandsons of Nirmal Chand Bysack, died.

In order to complete the history of the previous proceedings, it is necessary to go back to the suit brought by Hara Kumari against Tarini Charan and his co-trustee for a third share in the surplus of the two houses which was referred to the Registrar for enquiry on the 22nd July 1882, and to notice how it was finally disposed of. On the 15th March 1888, after prolonged proceedings before the Registrar and the submission of several reports, it was declared by the Court that the amount of money received by Tarini Charan Bysack and his two co-trustees from the 7th January 1859 to the 19th January 1886 was Rs. 1,10,248; that the sum of Rs. 86,212 had been expended on the worship of the Thakoors, leaving a balance of Rs. 24036. Out of this balance, Rs. 17,187 was declared to be the surplus profits of the properties devoted to the worship of Thakoorani Ananda Moyee, and Rs. 6849 as the surplus income derived from the property set apart for the worship of Issurjee Gopal Thakur, and Nirmal Chand Bysack was directed to divide the latter sum between the parties then entitled to in the proportions mentioned in the decree of the Supreme Court of the 14th December 1857; and on the 28th March 1889, an order was passed directing him to pay Rs. 1141-8 to Bolye Chand Sett and Sham Lal Sett, the executors of Preo Nath Sett, being 1-6th share of Rs. 6849.

It is to be observed that in this order of the Court the error was confirmed which had crept into the decree of the Supreme Court of the 14th December 1857 by which the Thakoor Sri Gopal Jew was by mistake substituted for the Thakur Ananda Moyee Thakoorani as the idol, the worship of which was to be

defrayed in the first instance from the profits of the two houses in Chowringhee and Pathooraghatta.

On the 20th February 1890, a further order was passed directing the Receiver to open separate accounts of the profits of the two houses in Chowringhee and Pathuriaghatta set apart for the worship of Thakur Gopalji (Ananda Moyee Thakurani), and after paying all necessary costs, fees and expenses and after paying to the trustees Nirmal Chand and the person to be associated with him the sum of Rs. 77 monthly to be applied for the worship of the Thakur, to divide the balance into six equal parts, of which two were to be paid to Hara Kumari (as representing the branch of Gopalmoni Dassi), one to Bolai Lal Sett and Sham Lal Sett, one to Ramanath Sett (these three persons representing the branch of Radha Kanta Sett), and two to Rajnarain Bysack son of Monmohini Dasse, (one of the original legatees). All costs of the proceedings were ordered to be paid out of the trust estate.

It does not appear, however, that there has been any division of the surplus since the order was passed.

Meanwhile, as we have been informed by the Counsel for the different parties, the sum of Rs. 53961-10-0, the sum invested in Government paper as part of the endowed property and out of which under definite orders of the Court the costs of the parties to previous litigation has been paid, has dwindled down to about Rs. 17000.

The principal reliefs claimed in the present suit are :

(1) That the will of Bhaggobutty Dasse may be construed and the rights of all parties thereunder with regard to the Shebaitship and surplus income may be ascertained and declared.

(2) That the plaintiff's right to the shebaitship be declared either singly or in conjunction with the other heirs of his father Nakoor Chandra Bysack, or in conjunction with them and the heirs of Mohan Chand Bysack and Nirmal Chand Bysack.

(3) That it be declared that the defendant Gopal Lal Sett has no right in the Shebaitship or in the surplus income.

(4) That it be declared that Radha Kanta Sett, Golap Dassi and Monmohini Dassi, if entitled to the surplus income at all, were entitled during their lifetime only and that their heirs and representatives had no right to it.

(5) That an account be taken of the expenditure incurred for the performance of the trusts of the will since the last account was taken.

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(6) That the balance found outstanding of the real properties and out of the sum of Rs. 53961-10 be paid over to the plaintiff.

(7) That it be declared that the defendant Gopal Lal Sett never acted and is not a fit and proper person to act as a trustee.

(8) That in case of doubt as to persons rightly entitled to the Shebaitship, a fit and proper person be appointed by the Court and

(9) That, if necessary, a scheme may be formed by and under the direction of the Court for the due performance and execution of the trusts of the Will.

For the shebaitship, there are in the present suit three different sets of claimants, the interests of the members of each set being substantially identical, though in one set the plaintiff is to be found with several of the defendants. The first set including plaintiff covers all the members of the branch of the family of the co-wife Kanak Moni Dassi. The second embraces all members of the branch of the family descended from Pran Krista Bysack, the eldest son of Bhaggobutty Dasse. The third includes all the descendants of Radha Kanta Sett, the grandson, daughter's son, of Bhaggobutty Dasse. Each of these sets claims the whole of any general surplus exclusive perhaps of the surplus of the profits of the two houses in Chowringhee and Pathuria-ghatta. The descendants of Monmohini Dasse, Radha Kanta Sett and Golap Moni Dasse claim to be entitled under the will, each branch to a one third share of the surplus profits of these two houses.

The main question in dispute between the parties appear from the following issues for trial which have been framed at the request of the different Counsels :

- (1) Who were Bhaggobutty's heirs ?
- (2) What, upon a proper construction of Bhaggobutty's will, was Uday Chand's position ? Was he a trustee or a Shebait or an executor only ?
- (3) Had Uday power to appoint successors to the Shebaitship by his will.
- (4) Was Shiba Sundari a co-shebait with Uday, and did she succeed him as Shebait ?
- (5) What was the position of Shiba Sundari with regard to the idols, was she merely an agent of the trustees for the purpose of performing the worship, or a Shebait ?

(6) If Shiba Sundari was a Shebait, of what idol or idols was she Shebait ?

(7) On whom did the Shebaitship devolve on Uday Chand's death ?

(8) What was Joy Kristo Bysack's mental condition at the time of Bhagobutty's death ? Was he by reason of lunacy permanently excluded from the succession ?

(9) Was Joy Kristo incapacitated by lunacy from succeeding to the *stridhan* of his mother or was he incapacitated from succeeding as Shebait ?

(10) Has the right to the Shebaitship ever been determined, and if so, when and how ?

(11) Were the several orders made in the suits referred to in the pleadings, orders merely appointing trustees to the Sheba, and what was the effect of the appointments ?

(12) Is Behari Lal Sett or are any of the descendants of Radha Kanta Sett bound by, and if so by what, orders passed in those suits in relation to the endowed property ?

(13) Is the question of the distribution of the surplus income of the two houses in Chowringhee and Pathuriaghatta *res judicata*.

(14) Does Bindubashini as administratrix of the estate of Haro Kumari, so far as it is *stridhan*, represent the line of Golap Moni Dassee so far as the inheritance to the share of the surplus income of those two houses is concerned ? if not, who is entitled to the share ?

(15) Did Bhagobutty dispose of all her *stridhan* by her will ? if so to whom ?

(16) Is Gopal Lal entitled to be a Shebait ?

(17) When did the succession open to the Shebaitship ?

(18) Were any of the properties mentioned in the will of Bhagobutty originally granted to her by her sons Joy Kristo, Pran Krishna, Radha Krishna and Jamuna Dassee, widow of Raj Kristo, and if so what persons are now entitled to them ?

(19) How far was Shiba Sundari associated with the service of any idol except Ananda Moyee Thakurani ?

(20) What are the Thakurs, the service of which is dealt with in the appeal ?

(21) What are the specific directions with regard to any one of these Thakurs ?

(22) How far, if at all, is the plaintiff or the sons of Nakoor Chand Bysack estopped by the statements of Nakoor Chandra

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Bysack in his deposition before the Registrar in the suit mentioned in the thirteenth paragraph of the written statement and statement of facts filed on the 14th February 1888 and the 1st March 1889 ?

(23) Are the defendants 7 and 8 entitled to the expenses of the Sheba from the 19th January 1886 up to date ?

(24) Was Nirmal Chandra Bysack, the father of defendants 7 and 8, the legal representative of Joy Krishto Bysack after the death of Haro Sundari Dassi, the widow of Joy Kristo, and are the present defendants now on the death of Haro Sundari entitled to the sheba as heirs ?

(25) If Shiba Sundari was shebait of only Ananda Moyee Thakurani, did the right to the shebaitship of that Thakur open out on the death of Shiba Sundari, and are defendants 7 and 8 now entitled to those rights ?

(26) Is the plaintiff in possession of the movable properties of the Thakurs ? What are those properties and who are now entitled to them ?

In dealing with these issues we have to take into consideration the following main points :

What was the nature of the previous suits instituted in the Supreme Court and the High Court, and what was the effect of the decisions in those suits, or, in other words, did the Court treat those suits as suits for the administration of the estate of the deceased Bhaggobutty Dasse or as suits for the construction of the will and determination of the trusts, if any, created under it ?

Did the Court in those suits finally determine in which branch of the family the right of inheritance to the shebaitship of the endowment vested, supposing that any endowment was created by the will, and did the Court finally decide the rights of the various members of the family to shares in the surplus profits of the houses in Chowringhee and Pathuriaghatta ?

If there has been no construction of the will and determination of the rights of the various members of the family to the property covered by the will, or under the endowment, if any, created by the will, or to the surplus share of the profits of the houses in Chowringhee and Pathuriaghatta, what is the proper construction of the will, and what are the rights of the various parties ?

Is it necessary for this Court now, in order to carry out the trusts or endowment created by the will, to frame a scheme for enforcing the trusts so as to place the endowment on a firm and satisfactory basis ?

How should the costs of the present litigation be met ?

There can be no doubt that the immediate outcome of the litigation up to the present date has been ruinous to the property, whether it be trust property or not, covered by the will. The costs of the litigation which have been ordered to be paid out of the estate have reduced the capital sum invested in securities from Rs. 53,691 to about Rs. 14,000, and from the date of Nirmal Chand's death on the 11th June 1900 the worship of the idols has been entirely neglected.

We have already noticed that the parties ranged as plaintiff and defendants in the present suit fall into three main groups, and as the members of each group adopt with some slight modification the same arguments, it will be convenient to set out these three series of arguments. At the same time, any special line, adopted by any special member of any group, will be noticed.

The first group consists of the original plaintiff, his two brothers Atul Chandra Bysack and Gagan Chandra Bysack, defendants Nos. 20 and 21, and his nephew Khoka, defendant No. 22. These are all the surviving descendants of Tarini Chand Bysack. With these are associated defendants Nos. 9, 10, 11, 12, 13, the grandsons of Mohan Chand Bysack and defendants Nos. 7 and 8 the two surviving sons of Nirmal Chand Bysack. The two latter advance a case of their own in addition to that put forward on behalf of the plaintiff. This group, it is to be observed, includes all the surviving descendants of Kanak Moni, the co-wife of Bhaggobutty Dasee.

The second group embraces the surviving descendants of Pran Kristo the eldest son of Bhaggobutty Dasee. They are Gopal Lal Sett, defendant No 1, and his brother Kanai Lal Sett defendant No 26, the grandson of Udoy Chand, and Gour Hari Bysack, defendant No. 2, the grandson of Monmohini Dasee. The claim of the last mentioned is confined to a share in the surplus profits of the two houses.

The third group covers all the descendants of Radha Kanta Sett, the grandson of Bhaggobutty through her daughter Tripura Sundari. They include the sons and grandsons of Pria Nath Sett, *viz.*, defendants Nos. 4 and 14 and Nos. 15, 16, 23, 24, and 25 and the widow of Rama Nath Sett defendant No. 5, and his son defendant No. 6 and three grandsons (defendants Nos. 17, 18 and 19). They claim an interest in the surplus as well as a right to the shebaitship of the endowment.

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Lastly, there is defendant No. 3, Bindubashini Dasi the granddaughter of Golap Moni Dasi, the daughter of Bhaggobutty Dassee, who claims an interest in the surplus profits of the two houses only.

The case of the plaintiff and the members of his group is as follows :—The property of which Bhaggobutty died possessed and which was disposed of by her will was her *ayautuka stridhan* and the will covered the whole of her *stridhan* property. This question was finally decided by the Supreme Court by its decree of the 14th December 1857. The suit brought by Golap Moni in the Supreme Court, whatever its form may have been, was in fact a suit for the construction of the will, for the determination of what properties were covered by the will, for the decision whether any, and if so, what, trusts were created by the will, and what were the rights of the parties under these trusts, and thus involved the determination of the question in whom the right to the shebaitship had vested. The endowment was in fact a family endowment existing prior to the death of Bhaggobutty. She carried on the worship of the idols, and in her will provided for the continuance of the worship. There was no distinction between the idols—the worship of all was joint and its cost was defrayed out of common funds. Under the terms of the will, Shiba Sundari was in fact appointed the Shebait of the idol, Udoy Chand being appointed Manager of the endowed properties and executor under the will for the purpose of carrying out its terms and of supplying Shiba Sundari with the necessary funds to meet the cost of carrying on the worship of the Thakurs. Though Shiba Sundari was in the will mentioned in connection with the worship of Thakurani Ananda Moyee only, she was in fact constituted the shebait of all the idols as there was no attempt made in the will to allot the profits of the different properties to each of the idols separately, as the worship of all was carried on jointly, as there were no separate accounts, and the shebait of one must have been the shebait of all. The right of Shiba Sundari to the shebaitship was finally determined by the Supreme Court in that suit. The succession to the shebaitship opened out, therefore, only on her death in 1858, and the right of inheritance to a shebaitship followed the same line as the right of inheritance to immovable property. At that time Tarini Chand Bysack, Mohan Chand Bysack and Nirmal Chand Bysack the grandsons of the co-wife of Bhaggobutty were the preferential heirs. The son of the co-wife is under the Hindu Law a prefer-

entail heir to a daughter's son, and therefore the sons of Radha Kanta Sett, who was then dead, had no right to the shebaitship. The right of Tarini, Mohun and Nirmal to the shebaitship was finally determined by the Supreme Court by its decree of the 7th June 1859, and that decided everything connected with the trusts created by the will except only the right to the surplus profits of the two houses in Chowringhee and Pathuriaghata which was specially reserved. The suit brought by Gopal Lal Sett, defendant No. 1, in the High Court on the 1st September 1876 asserting his right to the shebaitship was dismissed on the ground that he had no *locus standi* and had the effect of confirming the order of the Supreme Court of the 7th June 1859.

As to this argument it must, however, be observed that Gopal's claim to the shebaitship was based on the will of Uday Chand, and it was held that he had no *locus standi* to put forward any claim under the will as he was not born when Uday Chand died.

Further it has been argued that the suit brought by Hara Kumari Dasi on the 16th September 1881 was supplemental to the suit brought by Golap Moni, and that in that suit all she claimed was her one-third share of the surplus profits of the two houses in Chowringhee and Pathuriaghata. The orders passed on her application, made on the 12th August 1881 in that suit, that fresh trustees should be associated with Nirmal Chand, as his two brothers were then dead, could not have the effect of re-opening matters decided by the Supreme Court by its decree of the 7th June 1859, nor could they go behind those orders. The order of the 29th July 1889 appointing Lakhi Moni the daughter of Uday Chand joint trustee with Nirmal, and, after her death, the order of the 23rd November 1891 appointing Gopal Lal Sett to be joint trustee must therefore be regarded as temporary orders passed for limited purposes only and not as re-opening or re-determining the question of the right of succession to the shebaitship. Such orders passed on mere interlocutory applications could not displace a decree solemnly delivered after due trial on full materials and hearing of parties. Gopal Lal Sett, since his selection and appointment, had failed to discharge any of the duties of a shebait, and must be rejected as unfit for the office.

In the suit brought by Hara Sundari the order passed on 30th January 1886 after the death of Tarini Chand, substituting his son Nehal Chand as his representative, could only have been

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passed on the assumption that Tarini Chand's title as shebait was definitely settled. In that suit, Tarini and Nirmal in their written statements asserted that they were heirs to Bhaggobutty as grandsons of the co-wife in preference to all other members of the family then living, which included the sons of Radha Kanta Sett who was the daughter's son of Bhaggobutty, while Pria Nath Sett, the son of Radha Kanta, merely claimed to be entitled to a share in the one third share of the surplus profits of the two houses which was left by the will to his mother Tripura Sundari. Up to the 23rd May 1882 when the order was passed by Wilson J. on the suit of Hara Sundari, no attempt had been made to impeach the proceedings of the Supreme Court, the subsequent suits being brought as supplemental to that suit.

It has further been argued on their behalf that it is impossible now to contend that there was no endowment, that the property was all secular, and that the succession opened on the death of Bhaggobutty. Such a contention was not advanced before and in the face of the decision of the Supreme Court cannot be maintained. It is also impossible to contend that under the terms of the will, no shebait at all was appointed, as clearly Uday Chand and Shiba Sundari were mentioned as the persons who were to carry on sheba; or that there was an absolute appointment of Uday carrying with it a heritable right as Uday was directed to carry on the sheba with the consent of Shiba Sundari; or that there was a personal appointment of those two persons with regard to the worship of Ananda Moyee Thakurani alone as no distinction was made between the two idols or direction given as to the amount to be devoted to the worship of each; or that the appointment of Uday was a personal appointment of him alone as Shiba Sundari was associated with him. Uday was selected for the office with Shiba Sundari, because it was expected that he would have sons who would be able to carry on the worship. When he died, the shebaitship devolved on Shiba Sundari. After her death the succession again opened, and Tarini, Mohan and Nirmal were, as found by the Supreme Court, the preferential heirs of Bhaggobutty.

In support of the contention that the son of the co-wife is under the Hindu Law the preferential heir to the daughter's son, reliance is placed on Chapter IV, section 3, paragraphs 31, 32, 33 of the Dayabhaga, and on the case of *Tincowrie Chatterjee v.*

Dinonath Banerjee and others (1). We may observe, however, that in the case referred to, the point did not arise, and an opinion is merely expressed by the Judges that it was covered by the Hindu Law of Inheritance. It is argued that the text of the Dayabhaga is to be preferred to the opinion of Sri Krishna who, as noticed in the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (2), differs in more points than this from the Dayabhaga.

It was further argued that the shebaitship was heritable in the same way as other immovable property. The right could not, therefore, have passed under the will of Uday to his grandsons who were not born at the time of his death, as the ruling in *Tagore v. Tagore* (3) is applicable to a hereditary office (see *Gnana Sambanda v. Velu Pandaram* (4)).

On the deaths of Uday and Shiba Sundari, the shebaitship reverted to the heirs of the testatrix, [see *Gopal Chunder Bose v. Kartick Chunder Dey* (5)] and they were Tarini, Mohan and Nirmal the grandsons of the co-wife. •

Defendants Nos. 7 and 8, the representatives of Nirmal's branch of this group of the family, though relying on the case set up by the plaintiff, put forward a fresh case of their own, which is as follows. When Bhaggobutty died in 1841, her son Joy Kristo was alive, though he had become a lunatic in 1826. On his father's death Joy Kristo inherited his share of the ancestral property. Also his brother Raj Kristo having died in 1821, and his brother's widow Jamoona Dasse having died in 1847, a suit on his (Joy Kristo's) behalf was brought by his committee on the 11th October 1847, for a share of his brother's property. To this the representatives of the different branches of the family were parties, and it was decided in his favour on the 10th July 1849. His lunacy was not congenital, and therefore did not bar him from succeeding as preferential heir to the property left by Bhaggobutty Dasse; see *Murari v. Parvati Bai* (6). His title to the shebaitship passed to his widow Hara Sundari in 1850 on his death, and on her death in 1896 the right passed to Nirmal Chand, his brothers Tarini Chand and Mohan Chand being then dead. On the death of Nirmal, the right passed to his heirs, defendants Nos. 7 and 8.

It was also pointed out that the Supreme Court in its decree

(1) (1865) 3 W. R. 49.

(3) (1872) L. R. I A Supp 74.

(4) (1899) L. R. 27 I A 69; I L R. 23 M 1 271.

(5) (1902) I L R. 23 Cal. 716.

(2) (1905) 3 C. L. J. 15 (22.)

(6) (1876) I L R. I Bom. 177.

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of the 7th June, 1859, expressly stated that as the widow of the lunatic Joy Kristo had not been served with a notice of the suit and had not appeared, her rights were not affected by the decree.

It was further contended that defendants Nos. 7 and 8 were entitled to be recouped the money spent after 1886 by their father Nirmal Chand.

The case set forward by the second group which includes Gopal Lal Sett defendant No. 1 and Kanai Lal Sett defendant No. 26, the grandson of Uday Chand Bysack, is as follows:— (A) Either there was no dedication, partial or complete, under the will of Bhaggabutty of her property to the idols for the purpose of carrying on the worship. The will merely created a series of trusts on the property, the beneficial interest in which vested on her death in her heir Uday Chand. The lunatic Joy Kristo and the sonless widow Golap Moni had no right to succeed as heirs. (B) Or there was a complete dedication, in which case the shebaitship vested in Uday Chand absolutely and passed to his heirs. The use of the expression "*Malik of the Sheba*" indicated that the testator intended to convey to Uday Chand an absolute title as shebait. In support of this latter contention, the cases of *Lalit Mohun Singh Roy v. Chukkan Lal Roy* (1) of *Mussamut Kollany Komer v. Luchmee Pershad* (2) and of *Gnana Sambanda v. Velu Pandaram* (3) are relied on, as also Mayne's Hindu Law (7th edition) paragraph 585. (C) Or assuming that there was a complete dedication, the whole of the rights to the property did not pass to the idol, but the founder retained a right to appoint a shebait on the death of the incumbent of the office or to resume the property if the dedication failed, and therefore, if Uday was appointed for life, his heirs would be entitled to come in as shebait, and in support of this view the case of *Gopal Chunder Bose v. Kartick Chunder Dey* (4) is relied on. This last contention we may say at once cannot be accepted. In the circumstances assumed, on Uday's death the right to the shebaitship would pass to the heirs of Bhaggabutty, not to the heirs of Uday. (D) It is also contended that Shiba Sundari was merely a co-adjutor or overseer [see the case of *Brojo Chunder Goswami v. Raj Kumar Roy* (5)], and as such she had no title to the shebaitship. This view it is suggested is supported by the fact that she was not made a defendant in the suit brought by Golap Moni, and she was selected by the Supreme Court, on the report of the Master, only

(1) (1897) 1 L. R. 24 Cal. 834; L. R. 24 I. A. 78.

(2) (1875) 24 W. R. 395.

(3) (1899) L. R. 27 I. A. 619; L. R. 23 M.L. 271.

(4) (1902) 1 L. R. 29 Cal. 716.

(5) (1901) 6 C. W. N. 310.

as a fit and proper person to carry on the worship of the deities under the trust.

The suit brought by Golap Moni was to ascertain the scope of the will and what properties were dealt with by it and also to secure due administration to her estate. All questions relating to the construction of the will were reserved by the Supreme Court in that case, and the preliminary decree merely gave directions to the Master to enquire into certain questions of fact for the purpose of a due administration of the estate. The Master was not required to decide the rights of the parties, and in fact he had no power to decide such questions, and in his notes of 8th March 1859 Tarini, Mohan and Nirmal are suggested as fit and proper persons to conduct the religious services in accordance with the trusts, "if duly vouched for personally by people who are wellacquainted with them." Clearly, he did not intend to determine the rights of the different parties to the shebaitship but to mention persons who were fit to carry on the worship temporarily, pending the disposal of the proceedings and the determination of the rights of the parties (see Daniell's Chancery Practice 7th Edition 850).

The fact that in the suit brought by Hara Sundari the son of Tarini was brought on the record as his representative after his death could not be taken to support the contention that Tarini was accepted as the shebait by right of inheritance. In fact in that suit Tarini and Nirmal were charged with wrongful misappropriation of the profits, and it was on that account that Tarini's son was substituted as his representative after his death. If the other view were correct, why were not the heirs of Mohan brought on the record on his death?

Further, the state of facts filed by Lakhi Moni on the 23rd April 1888 and her subsequent appointment as shebait go to show that the right of inheritance to the shebaitship was not determined by the Supreme Court in 1859; also the order passed by Trevelyan J. on the 23rd November 1891 sending back to the Registrar the reference for enquiring to select proper persons for the shebaitship and his subsequent order appointing Gopal Lal Sett after receipt of the Registrar's report, support the same conclusion.

The case of these defendants therefore is that the succession opened on the death of Bhagabutty Dasse, that Uday Chand then succeeded to the shebaitship and that Gopal Lal and Kanai Lal is his heirs are now entitled to the office, and to the management of the endowed properties.

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On behalf of the brother Kanai Lal Sett, a question was suggested whether the properties covered by the will of Bhagabutty Dassee were her *ayantuk Stridhan* or whether the will embraced all her property. It was not however pressed. *

On Kanai's behalf it was also argued that the profits reserved for the worship of the idols constituted a small portion only of the entire profits of the properties covered by the will. Elaborate calculations in support of this contention were made shewing as the result that the balance after defraying the worship would come to something less than Rs. 500 out of an income of over Rs. 4,000. It was, however, contended that the effect of the will was not to create a valid endowment, but merely to charge the properties specified therein with certain trusts for the worship of the idols. The property therefore remained secular and passed by the ordinary line of descent to Uday Chand on the death of Bhagabutty, and after Uday's death to his heirs.

In response to the argument that the endowment was created prior to the will, it was argued that the Master's report only indicated that Bhagabutty carried on the worship and defrayed the expenses out of her own property but that would not be sufficient to constitute an endowment; see *Ram Pershad Doss Adhikarce v. Sreechance Doss Adhikarce* (1).

In opposition to the contention that the bequest of the share in the surplus profits carried the right to the corpus of the property, reliance was placed on the cases of *Ashutosh Dutt v. Durga Charan Chatterjee* (2), *Surendra Keshab Roy v. Doorga Sundari Das* (3), *Sonatan Bysack v. Sreemutty Juggutsoondree Dossee* (4).

It was also contended that the testatrix by declaring in the will that Uday was to be *Malik of the Sheba* intended to confer on him an absolute and heritable title to the shebaitship, and in support of the case of *Rajnarian Bhaduri v. Katvayani Dabee* (5) was relied on.

It was lastly contended that the failure of Gopal Lal in his previous suit could not bar him from recovering in the present suit. In that suit he claimed as legatee of Uday. In this suit he claims by right of inheritance.

Gourhari Bysack, defendant No. 2, who has been included in this group, in fact confines his claim to a share in the surplus profits of the houses in Chowringhee and Pathuriaghatta, and relies on the decree dated the 15th March 1888 in the suit of

(1) (1872) 18 W. R. 399

(2) (1879) L. R. 6 I. A. 182; I. L. R. 5 Cal. 439; 5 C. L. R. 296.

(3) (1891) L. R. 19 I. A. 108 (at 127); I. L. R. 19 Cal. 513

(4) (1859) 8 M. L. A. 66.

(5) (1900) I. L. R. 27 Cal. 619

Hara Kumari and the order of the 20th February 1890 directing the payment of 2/3 of the surplus to his father Rajnarain Bysack. As Tarini, Mohan and Nirmal had an opportunity of being heard in that case, the question so far as their descendants are concerned is *res judicata*. In support of this contention the cases of *Shyama Charan Banerji v. Mrinmayi Debi* (1) and of *Dost Muhammad Khan v. Said Begam and others* (2) are relied on.

The third group includes the two branches of descendants of Radha Kanta Sett, the daughter's son of Bhaggabutty Dassee. They are defendants Nos. 4, 5, 6, 14, 15, 16, 17, 18, 19 and 24. Their case is that the dedication of the properties to the idols was made by Bhaggabutty Dassee during her life time and that no endowment was created by the will. All that the will purported to do was to give directions declaring the various properties out of the profits of which the worship of the deities was to be kept up and to appoint Uday Chand as manager of the properties. In carrying on the worship of Ananda Moyee Thakurani, due deference was to be paid to the wishes and advice of Shiba Sundari Dassee, but that direction had not the effect of constituting her a shebait. It is not correct to say that the expenses of the worship were to be defrayed from one common fund. The will contemplated the appropriation of the profits of different properties for the expenses of the worship of the different deities and the keeping of separate accounts. The appointment of Uday as manager of the properties and as executor of the will was purely a personal appointment and conferred no right of inheritance on his heirs.

The scope of the suit brought by Golap Moni was not for a construction of the will and a determination of the rights of the parties under the trusts, created thereby, but to recover the whole or a part of the property left by Bhaggabutty Dassee on the ground that she was the preferential heir and that Bhaggabutty had died intestate, or that the will, if valid, did not cover the whole of the properties of which she died possessed and that Golap Moni was entitled to the residue. The suit was one for administration of the estate of Bhaggabutty Dassee for the purpose of securing to Golap Moni her rights as heiress. She had no interest in the management of the endowment so as to seek in that suit for a construction of the will for the purpose of determining who were the persons entitled to the management. At most all she could ask for, in the event of the will being held

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(1) (1902) I. L. R. 31 Calc 79.

(2) (1897, I. L. R. 20 All. 81.

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to be valid and to cover the whole of the *Stridhan* of which Bhaggobutty died possessed, was a construction of the will so far as it dealt with the surplus profits of the houses in Chowringhee and Pathuriaghatta, and to secure the appointment of trustees for the purpose of enabling her to get her share of that surplus. In such a suit the determination of the right of the various claimants to the shebaitship could not have been in issue. All the Court had to look to was that fit and proper persons were appointed to carry out the trust for the purpose of enabling the plaintiff to obtain the relief she claimed.

The decree passed by the Supreme Court in 1859 had the effect of determining only (1) what properties belonging to Bhaggobutty's estate were in the hands of the derivative executors, (2) that there was due from Uday's estate to the trust the sum of Rs'53,691, (3) that the derivative executors should pay that sum to the receiver, (4) that an account should be taken of the receipts and disbursements by the executors after the death of Uday in respect of the properties covered by the trust, (5) that Shibo Sundari was a fit and proper person to carry on the religious ceremonies provided for by the trust, and (6) that the surplus profits of the houses in Chowringhee and Pathuriaghatta were to be paid, one-third to the representatives of Radha Kanta Sett, one-third to the representatives of Golap Moni and one-third to Monmohuni during her life-time and to her representatives after her death.

The facts, that a receiver was appointed, that the trustees were appointed for their lives or until further orders, and that the costs in the suit of all parties were ordered to be paid out of the estate of the deceased, all indicate that the suit was treated throughout as an administration suit, and no attempt was made in it either to construe the will authoritatively or to determine finally the rights to the shebaitship as between the various members of the family.

The fact that Joy Kristo Bysack was a lunatic was sufficient under the Hindu Law to disqualify him from inheritance to the shebaitship. It was not necessary that the lunacy should be congenital to disqualify for an office, the duties of which could not be discharged by a person who was not sane. Whatever may be the case in Bombay, it has been held in Bengal that insanity at the time the inheritance falls in is sufficient to exclude.

The report of the Master that Tarini, Mohan and Nirmal were fit and proper persons to be appointed trustees, which was

confirmed by the Supreme Court, could not have the effect of determining their right to the shebaitship. Such a question could only have been decided by the Court judicially on evidence taken before it. The title now set forward, based on the contention that the sons of a co-wife are preferential heirs to daughter's sons, was never advanced till Nirmal mentioned it in his state of facts in 1888, and he then suggested as a proper person to be associated with him as trustee, Babu Gour Das Bysack, a retired Deputy Magistrate who was not even a member of any branch of the family of Gobind Chand Bysack. Clearly he never considered that the right to the shebaitship had been finally decided by the Supreme Court.

As regards the relative rights of the daughter's son and the son of a co-wife to succeed to the *stridhan* of Bhaggobutty Dasee, it has been argued that the doctrine of spiritual benefit is not the only matter to be taken into consideration. The wishes of the person whose property it was, as also the wishes of the persons from whom she received the property by gift, have to be taken into consideration in determining the question of inheritance to *stridhan* property. The instincts of natural affection are allowed to have influence, and all authorities agree that in determining the line of succession, prominence should be given to the issue of the lady herself, *i.e.* sons, grandsons, etc.; (See Banerjee on *Stridhan* first edition page 416, as also the lists of heirs as given in Shama Charan's *Vyavastha Darpana* at page 262).

Further, it is argued that the verse of the Dayabhaga on which the plaintiff relies is spurious and an interpolation. Chapter IV section 3 in which it occurs deals with childless widows, and verse 33 is entirely out of place with the context. Further, it contradicts Chapter IV section 2 verses 11 and 12. And thirdly, it is not referred to by the older commentators. It is first mentioned by Srikrishna. For two centuries the law had been otherwise, and the arguments of the plaintiff that the text of the Dayabhaga of Jimuta Vahana must be taken to be genuine and authoritative and the opinion of commentators ignored is not a course which ought to be adopted in the present case. See the case of the *Collector of Madura v. Mutthu Ramalinga Sathupathy* (1) in which the Privy Council have laid down that the duty of a Judge in administering Hindu Law is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received

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by the particular school which governs the district with which he has to deal and has there been sanctioned by usage.

It is contended that the succession to the shebaitship opened on the death of Uday Chand in 1842. Uday's only issue then was a daughter of a year old. The inheritance went to Radha Kanta Sett the daughter's son of the testatrix who was the preferential heir and who did not die till 1846. His grandsons are now entitled to the shebaitship.

With regard to the contention advanced on behalf of Gopal Lal Sett defendant No. 1 that the office of shebait was the same as immovable property and that the grant of the office to Uday was by itself sufficient to carry all the rights without the addition of words of inheritance, it is contended that this cannot be extended to a case in which the question of the personal confidence to be reposed on the individual must determine the rights of the parties.

Lastly it has been argued that these defendants have not abandoned their title to a share in the surplus profits of the two houses. The orders passed with regard to the surplus in 1859 directed that it should be paid, $\frac{1}{3}$ rd to the heirs of Golapmoni, $\frac{1}{3}$ rd to the heirs of Radha Kanta Sett, $\frac{1}{3}$ rd to Monmohini and to her heirs after her death. In Hara Kumari's suit, Priyanath and Ramnath were both parties and claimed a one-third share in the surplus, and under the judgment of Mr. Justice Wilson in 1882 they were declared entitled to equal benefits with Hara Sundary in all previous decrees and orders in the course of the litigation. Again after the account had been taken in 1888 and Rs. 240,36 found to be due to the estate, the sum of Rs. 17,187 out of the sum was allocated to the surplus profits of the properties dedicated to Anandamayee Thakurani. The fact that Bolye Lal Sett and Sham Lal Sett failed on appeal in their suit against Nirmal to have the latter sum brought into Court did not destroy their rights to a share in the surplus. It was held on appeal that the sum of Rs. 17,187 was not surplus profits of the properties dedicated to Ananda Moyee Thakurani and therefore that they could not succeed in their suit.

On behalf of this group of defendants, it is therefore contended that they are entitled by right of inheritance to the shebaitship and to recover a share in the surplus of the properties devoted to the worship of Ananda Moyee Thakurani.

On behalf of Shamlal Sett defendant No. 4 the following case has been also argued as regards the surplus. In the will

the testatrix bequeathed to the three persons named therein the share in the surplus profits of the properties dedicated to Ananda Mayee Thakurani, and, as the direction to divide the profits among them was unlimited in point of duration, it was intended to continue so long as the properties remained in existence. She intended to make a natural provision for her direct heirs, and Uday was appointed as executor to carry out her wishes. In using the term "malik," she merely intended to designate him as manager of the worship. There were no words of bequest to Uday and there was no intention to confer on him any permanent or heritable right in the property. It only granted him a personal privilege.

The absence of words of limitation in his appointment did not operate to convey an estate of inheritance. This view, it is urged, is supported by the decisions of the Privy Council in the cases of *Kamini Debi v. Asutosh Mukerji* (1), and of *Gnanasambanda Pandara Sanadhi v. Velu Pandaram* (2), and therefore the opinion expressed in Mayne's Hindu Law (7th Edition) para 585 to the contrary effect cannot hold good.

The bequest to the three persons of the right to the profits permanently, operated as a bequest of the whole corpus of the property of which they were to receive the profits. In support of this proposition, reliance is placed on the cases of *Elton v. Sheppard* (3), of *Adamson v. Armitage* (4), of *Mannox v. Greener* (5) and of *Hemangini Dasi v. Nobin Chand Ghose* (6).

Further, it was argued that the right of this defendant to a share in the surplus was not determined by the Judges who heard the appeal in his case against Nirmal Chand in 1890. That judgment was in the nature of an interlocutory judgment and could not operate to bar their right under the doctrine of *res-judicata*.

The suit brought by Golap Moni was an administration suit, and it could have been no part of the proceedings in that suit to construe the will (see Seton on Judgments and Orders Vol. 2 page 1477), and therefore even if there was a decision in that suit as to the effect of the will, it would not operate as *res-judicata*.

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(1) (1888) I L. R. 16 Cal. 103; L. R. 16 I. A. 159.

(2) (1899) I L. R. 23 Mad. 271; L. R. 27 I. A. 69.

(3) (1781) 1 Brown. C. C. 532.

(5) (1872) L. R. 14 Eq. 456.

(4) (1816) 19 Ves 416; Coop 283.

(6) (1882) I. L. R. 8 Cal. 788.

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It was further argued that the position of Shiba Sundary under the will was merely that of a person asked to assist the executor and did not operate as an appointment of her as shebait. In support of this contention, reliance is placed on the cases of *In the goods of W. F. Stevenson* (1), and *Eastern Mortgage and Agency Co., Ltd., v. Rebati Kumar Ray* (2); she was merely mentioned as a person to assist the executor and assent to certain of his acts. Lastly there is the case of Bindu Bashini defendant No. 3 who only claims a share in the surplus profits of the two houses in Chowringhee and Pathuriaghatta. She relies on the decree of the 15th March 1888 and the order of the 20th February 1890.

We may mention that the parties before us have been represented by fourteen counsel or groups of counsel and that defendants Nos. 15, 16, 20, 23 and 24 have appeared in person.

It has been necessary to set out the previous proceedings and the arguments of the parties at greater length than might otherwise have been required, because the previous proceedings have been protracted and the orders passed at different times seem at first sight difficult to reconcile, and also for the reason that this Bench has been constituted to hear the case so as to avoid the expense of a double appeal. As, therefore, there is little hope that the parties will be satisfied with the judgment of this Court, we have gone at length into the facts for the information of the Court of final appeal.

The first question which we have to consider is, what was the nature and scope of the suit brought by Golap Moni Dasi on the 27th August 1846; was it an administration suit only, or was it a suit for the construction of the will and for the determination and enforcement of the trusts, if any, created thereby? In determining this question, we have to take into consideration the nature of the proceedings and orders passed, first in the Supreme Court and afterwards in the High Court, in the proceedings in this suit and in the subsequent suits which were either supplementary to it or arose out of it.

After a careful consideration of all the facts, the orders passed, and the arguments advanced, we have no hesitation in holding that the suit must be regarded as a suit for administration of the estate of the deceased Bhaggobatty Dassee. In form, it was such a suit. After seeking discovery of all the property of which Bhaggobatty Dassee died possessed and of all that remained after her death and

(1) (1852) 16 Jur. 714.

(2) (1906) 3 C. L. J. 260.

her estate had passed into the hands of Uday Chand and afterwards to his executors, it proceeded to allege that Bhaggobutty Dassee as a Hindu female had no right under the Hindu law to make an absolute disposition of her immovable *stridhan* property. The oratrix Golapmoni then as sole surviving daughter of Bhaggobutty Dassee claimed to be entitled as heiress to the whole of the *stridhan* property left by Bhaggobutty, if it should be found that the will was invalid; otherwise she claimed to be entitled as heiress to succeed to the balance of the *stridhan* property left by her, Bhaggobutty Dassee, which was not covered by the will. It was alleged that the will did not cover the whole of the property of which Bhaggobutty died possessed, and that Golapmoni as her heiress was entitled to the residue. She prayed for a determination of the rights of parties interested in the will, that the religious and charitable bequests be declared void, and that Golapmoni be entitled to succeed as sole heir to all the properties of Bhaggobutty Dassee not covered by the will. There was also a prayer to restrain the executor of Uday from incurring further expenses out of the estate pending the disposal of the suit. It concluded with the prayer that the Master be directed to take an account of all properties belonging to the estate and after, in due course of administration, deducting necessary expenses, and paying funeral expenses debts and legacies, to hand over the balance to the oratrix. There was also a prayer for the appointment of a Receiver to take charge of the property pending the disposal of the suit.

This was clearly a suit for administration and for a determination of the provisions of the will and of the properties covered by the will for the purpose of carrying out the administration. In a suit of that description there was and could be no prayer for the construction of the will and the determination of the rights of the parties under the trusts created by it.

In the written statements filed by the defendants, no question of construction of the terms of the will was raised. The right of the testatrix as sole heir of Bhaggobutty was disputed, and it was alleged that the will was a valid testamentary disposition of all the *stridhan* property left by Bhaggobutty Dassee.

The preliminary decree of the 10th September 1847 was in the first instance such as would ordinarily be passed in a suit for administration. It directed discovery of the properties belonging to the estate, the taking of accounts, and the issue of notice to creditors. The concluding directions are important. It directed the Master to enquire and report what religious ceremonies had

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been performed during the lifetime of the testatrix and had been continued after her death, and to enquire and report who would be a fit and proper person to execute and perform such of the religious trusts mentioned in the will as were still capable of being performed. The question is whether the carrying out of these directions would amount to a construction of the will or a determination of the trusts created by it? It seems impossible to hold that they could have had that object or effect. The construction of the terms of the will and the determination of the trusts were clearly matters for judicial decision on the evidence, and could not have been referred to the Master for enquiry and report.

The report of the Master made on the 10th November 1857, also appears to have been one made for the purpose of administration. It gives a list of the immovable property of the deceased and an account of the movable and monies showing a balance due to the estate from the executors of Uday of Rs. 53,961-10, and gives a list of the jewellery and ornaments which had been dedicated to the idols. It further stated that the will covered all the property of which the testatrix died possessed as her *stridhan*, and that it was property which she had received as gift from her husband after her nuptials and that under the law she had full power of disposition over it. It proceeded to state that the religious ceremonies which had been performed by Bhaggobutty during her lifetime at an annual expenditure of Rs. 3271 had been carried on since her death at an annual expenditure of Rs. 2,383-11 and were still capable of being performed, and Shiba Sundari the step-mother of Uday Chand was a fit and proper person to carry on the religious services. It did not however suggest that Shiba Sundari was, by any right conferred by the will or by right of inheritance, entitled to be manager or *shebait* of the endowed properties.

The report further set out that in the will there was a direction that the surplus profits of the houses in Chowringhee and Pathuriaghatta which were allocated under the will for carrying on the worship of the idol Ananda Moya Thakurani were to be divided in equal shares between Radha Kanta Sett, Golapmoni and Monmohini Dassee, and that the surplus amounted to Rs. 4,266-12-3. In reporting this fact, however, it does not appear that the Master pretended to determine the rights of the parties. He reported facts ascertained from the will itself and the further fact that there was a surplus. This cannot be taken as a determination of the rights of the parties.

The first points which require determination are, what was the nature and scope of the equity suit which was filed by Golap Moni Dassee on the 27th August 1846 in the Supreme Court in Calcutta, which after her death, was dismissed on the 30th June 1853, but was revived on the 9th March 1854 on the application made by the two surviving daughters, and terminated in the decree passed on the 14th December 1857. What was the effect of the orders passed in that suit as determining the rights of the parties in the present suit, or, in other words, was that suit treated in the Supreme Court as a suit for the administration of the estate of Bhaggobutty Dassee or as a suit for the interpretation of her will and for the determination of the trusts, if any, created by that will? What was the nature of the proceedings taken subsequent to and in continuation of the decree of the 14th December 1857 and what was the effect of the orders passed on the 7th June 1859 and afterwards in those proceedings? How, if at all, are the rights of the parties in the present suit affected by the appearances and acts of their predecessors in interest in those proceedings? What was the nature and scope of the suit instituted by Gopal Lal Sett on the 1st September 1876, and what was the effect on the rights of the parties in the present suit of the order of the 28th May 1877 dismissing that suit? What was the effect of the order of the High Court passed on the 1st March 1880 after the death of Mohan Chand Bysack, continuing Tarini Chand and Nirmal Chand as trustees of the endowment? What was the nature and scope of the suit instituted by Hara Kumari Dassee on the 16th September 1881 against Tarini Chand and Nirmal Chand? What was the effect of the decree passed in that suit by Wilson J. on the 23rd May 1882, and what was the effect of the order of the 30th January 1886 passed after the death of Tarini Chand substituting in the execution proceedings his son Nakoor Chandra Bysack as his legal representative? What was the effect of the order passed by Trevelyan J. on the 6th December 1888, on the application made by Hara Kumari Dassee on the 12th August 1886 for the appointment of a joint trustee to be associated with Nirmal Chand, and also of the orders passed on the 29th July 1889 and on the 23rd November 1891? What was the effect of the orders passed on the 15th March 1888 and on the 20th February 1890 in the suit instituted by Hara Kumari?

In determining the nature and scope of the suit brought

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by Golap Moni in 1846, her position and relationship to Bhaggobutty Dasse must be considered and also the reliefs sought for by her in that suit. Golap Moni was the sole surviving daughter of Bhaggobutty Dasse, Udoy, the son's son of Bhaggobutty, was dead, so also Radha Kantā Sett the daughter's son. Joy Kristo, the son of Bhaggobutty, was alive but was a lunatic. Raj Kristo, another son of Bhaggobutty, was dead, but the widow Jamoona Dasse was alive. Radha Kristo Bysack the son of the co-wife was dead. Golap Moni claimed to be the heir under the Hindu law to Bhaggobutty and, as such, to be entitled to all the *stridhan* property left by Bhaggobutty which was not covered by any will. She denied the legality of the will under which Udoy, and after his death, his executors had taken possession of the property left by Bhaggobutty at her death, thereby raising the question whether the will propounded by Udoy Chand was a valid disposition by him of her property or not. In the event of the will being found by the Court to be valid, Golap Moni claimed to be entitled to the residue of the property of Bhaggobutty not covered by the will. She further prayed for discovery of all the property left by Bhaggobutty, that accounts be taken of all receipts and disbursements out of that property since the death of Bhaggobutty, and that after the payment of debts and funeral expenses the balance outstanding be made over to her. All the representatives of the different branches of the family of Bhaggobutty were made parties to the suit, including the executors to Udoy's estate, and they in their written statement raised the question whether Golap Moni Dasse as a sonless widow was in fact the next and sole heir, as she alleged, to the *Stridhan* property of the deceased.

The nature of the suit as framed was clearly one for administration of the estate of Bhaggobutty Dasse brought by a lady who claimed to be her sole heir. It is true that there was a prayer in it that the rights of all the parties interested under the will of Bhaggobutty be ascertained and declared, but there was a further prayer that the several religious and charitable bequests and bequests of the surplus under the will be declared to be void and of no effect. This latter prayer is certainly inconsistent with the view that the suit was one for an interpretation of the will and a determination of the rights of the various members of the family under the trusts created by the will. There was no claim put forward on her behalf for a share in the surplus profits of the houses in Chowringhee and Pathuriaghatta which

profits under the will were allotted in the first instance to defray the expenditure of the worship of the idol Ananda Moyee Thakurani.

The scope of the suit was clearly to have the religious trusts, which the will purported to create, declared to be void, and not to have the rights of any parties under those trusts ascertained. In fact it was a suit brought for the administration of the estate, of Bhaggobutty, in order that the plaintiff, or oratrix, might, after accounts had been taken and all debts discharged, obtain a decree for the entire balance of the property, or for the balance of the residue of the property exclusive of that which was legally and validly disposed of by the testatrix under the will.

We have next to consider whether that suit was treated in the Supreme Court as an administration suit or as a suit for the interpretation of the will of Bhaggobutty Dasee and for the determination of the trusts, if any, created by that will, and in deciding this question it is necessary to take into consideration all the orders passed by the Supreme and High Courts in the course of the proceedings which originated out of this suit. For the plaintiff and those of the defendants who fall in the same group with him, in order to support their contention that the suit was treated as one for the interpretation of the will of Bhaggobutty Dasee, the determination of the trusts created by it, and the ascertainment of the rights of the different members of the family under those trusts, reliance has been placed *first* on the terms of the preliminary decree of the Supreme Court of the 10th September 1847 referring the case to the Master. This, it is argued, by directing him, *inter alia*, to enquire and report what religious ceremonies had been performed during the lifetime of the testatrix and continued after her death, and to enquire and report who was a fit and proper person to carry on the trusts, clearly had for its object the construction of the will and the determination of the rights of the parties under the trusts which it created. Reliance is placed *secondly* on the report of the Master of the 10th November 1857 which it is argued had for its object the determination of the trusts created by the will and the ascertainment of the person who was entitled under the will to administer those trusts, that is to say the right to the shebaitship of the endowed property; and *thirdly* on the decree of the Supreme Court of the 14th December 1857 confirming the report of the Master and declaring Shiba Sundari Dasee to be a fit and proper person to carry on the worship of the deities as provided by the trusts

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created by the will, which it is argued determined the right of Shiba Sundari to the shebaitship; *fourthly*, the order of the Supreme Court of the 7th June 1859 is relied on as determining the right of Tarini, Mohan and Nirmal, the grandsons of the co-wife, to the shebaitship as heirs preferential to the sons of Radhakanta, the daughter's son, and to the descendants of Uday, and as deciding everything connected with the trusts created by the will, except only the right to the surplus profits of the houses in Chowringhee and Pathuriaghata; and *fifthly*, the order of the High Court dated the 28th May 1877 dismissing the suit brought by Gopal Lal Sett is relied on as determining that he and his brother had no right to the shebaitship. The order substituting Nakoor Chand Bysack as legal representative of his father Tarini Chand, in the suit brought by Hara Kumari, it is argued, also indicates that the right to the shebaitship had been finally determined by the Supreme Court. The order of the 6th December 1888, discharging the report of the Registrar to the effect that Nakoor Chand was a fit person to be associated with Nirmal as trustee, the directions with which the reference was sent back to the Registrar, and the subsequent orders, of the 29th July 1889, appointing Lakhimonee as trustee, and of the 23rd November 1891 appointing Gopal Lal Sett as trustee, all these it is argued were orders made on interlocutory applications and as such could not reopen or modify the previous orders contained in solemn decrees.

These arguments do not appear to be sound, and to accept them would be tantamount to holding that the orders previously passed by the Judges of the Supreme Court and High Court are inconsistent and irreconcilable, as the distinction which it is proposed to draw between the later orders as interlocutory and the previous orders does not appear to be one which can be accepted. Clearly, all were orders arising out of the proceedings following the institution of the original suit, the subsequent suits being merely supplementary. This view of the previous orders is one which we should certainly hesitate to accept unless the grounds advanced to support it were much stronger than those which have been laid before us in the present case. We have already expressed our opinion that the suit brought by Golapmani, both in its nature and scope, was one for the administration of the estate of Bhaggobutty Dassee. For the purposes of such a suit, it would not be necessary for the Court to ascertain definitely the rights of the different claimants to the shebaitship

of the endowed properties covered by the will. All that the Court would be called on to do would be to make provision for the protection of the trust property and for the performance of the worship of the idols during the pendency of the suit for administration, and this would involve the ascertainment of what religious services had all along been performed and were to be continued. The plaintiff herself set forward no claim to the shebaitship, nor was any issue on that point raised in her plaint. The Court was not therefore called on in that suit to determine the right to the shebaitship, and the form and substance of the orders passed and of the directions given to the Master and Registrar are consistent with the view that the Court did not take up for determination the question, who was entitled by right of inheritance to be the shebait under the trusts created by the will. Looked at in that light, the orders of the Supreme Court and of the High Court are consistent and reconcilable, and we do not think that sufficient reasons have been advanced which would justify us in taking a contrary view.

The form in which the decrees and orders were framed and the directions given to the Master and Registrar, support the same conclusion, and though the extract from the minutes of the proceedings before Mr. Macnaghten as Master indicates that the question of the rights of the several parties to the shebaitship as preferential heirs of Bhaggobutty Dassee was raised before him and considered, it cannot in our opinion be held that he had power finally to determine that question; and in the report which was finally submitted to the Court by his successor, it was merely stated that Tarini, Mohan and Nirmal were fit persons to keep up the religious trusts.

The decree of the 14th December 1857, merely declared that Shiba Sundari was a fit and proper person to keep up the religious trusts, and directed the Receiver to pay over the balance of the profits after defraying certain necessary expenses to Shiba Sundari. "during her natural life or till further orders of the Court." This limitation would have been unnecessary if the decree had been intended to determine finally the right of Shiba Sundari to the shebaitship. The order of the 7th June 1859, appointing Tarini, Mohan and Nirmal as trustees was in similar terms and is open to the same comment. The suit brought by Gopal Lal Sett was dismissed on the ground that he had been nominated to the office by the will of Uday Chand, but the right to the shebaitship under the terms of the will executed by

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Bhaggobutty Dasee was not then considered or determined. The directions issued by Trevelyan J: to the Registrar on the 6th December 1888, the order of the 29th July 1889 appointing Lakshimani Dasee as a joint trustee with Nirmal, and the order of the 23rd July, 1891, appointing Gopal Lal Sett as joint trustee, are entirely inconsistent with the view that there had been any final determination by the Supreme Court of the right to the shebaitship.

The orders, on the other hand, appear to be consistent and reconcileable if the conclusion be adopted that the appointments of these different persons as trustees were made as temporary arrangements for carrying out the objects of the trusts pending the administration of the estate of Bhaggobutty Dasee, and we think that it is the only conclusion which it is possible to accept. The reliefs claimed and the form and substance of the orders passed were, we may observe, such as would be natural in a suit for administration. We are unable, therefore, to agree with the contention of the plaintiff that there was a final determination of the right to the shebaitship in the decrees of the 14th December 1857 or of the 7th June 1859 or that it was confirmed by the order dismissing the suit of Gopal Lal Sett on the 28th May 1877, or that the order substituting Nakoor Chandra Bysack as a defendant in the place of his deceased father Tarini passed on the 30th January 1886 in his execution proceedings in the case brought by Hara Kumari Dassi must be taken as indicating that there had been a final determination of the right to the shebaitship. The reason suggested for the substitution by the second group of the parties appears to be sound, namely, that as the suit was against his father and his co-trustee for misappropriation of trust funds, it was necessary to substitute for his father as a defendant on the death of the latter. So far then as the present suit is concerned, the rights of the present parties to the shebaitship under the will of Bhaggobutty Dasee cannot be held to be affected either by those orders or by the appearances and acts in those proceedings of their predecessors in interest. The suit brought by Golapmoni Dasee was in form and effect a suit for administration of the estate of Bhaggobutty Dasee, it was so treated by the Supreme Court and by this Court, and the subsequent suits were merely supplementary to that suit and related to the administration of the estate and not to the construction of the will or the determination of the rights of the parties under the trusts.

The next questions which demand consideration are, what is the proper construction of the will executed by Bhaggobutty Dassee on the 29th May 1841, what were the trusts created by that will, and what rights to the shebaitship were conferred under the will on Udoy Chand and Shiba Sundari, and what was the nature of the bequest made to Monmohini Dassee, the son's daughter of the deceased, Radha Kanta Sett, the daughter's son of the deceased, and Golapmoni Dassee, the daughter of the deceased, of equal shares in the surplus profits of the houses in Chowringhee and Pathuriaghatta.

The genuineness of the Will has never been disputed. Questions as to its validity and whether it covered the whole of the *ayautuka stridhan* left by Bhaggobutty Dassee were no doubt raised in the suit brought by Golapmoni Dassee. In that suit, it was however decided by the Supreme Court that the will was a valid disposition on the part of Bhaggobutty Dassee, and that it covered the whole of the *ayautuka stridhan* property of which she died possessed. Those points were necessary for determination for the purposes of the administration of her estate, and we hold that those questions were finally determined by the Supreme Court in that suit, and that the contentions advanced to the contrary in this suit cannot be maintained.

On behalf of the plaintiff and those grouped with him, it has been urged that the endowment was a family endowment existing prior to the death of Bhaggobutty Dassee, and that the will merely provided for the continuance of the worship, that Udoy Chand and Shiba Sundari were both appointed shebait, that no distinction was made between the different idols or distinct allotment made to each, of the profits of the several properties, and that on the death of Udoy Chand, Shiba Sundari became, under the terms of the will, shebait of all the idols and her right was determined by the Supreme Court.

On behalf of Gopal Lal Sett and the other defendants grouped with him, it has been contended either that there was no complete dedication under the will of the properties to the idols and that the will merely created a series of trusts on the properties, the beneficial interest in which vested in Udoy Chand on the death of the testatrix, or that there was a complete dedication of all the properties under the will; the right to the shebaitship of the endowment was bequeathed to Udoy Chand absolutely, and that on his death, it passed to his heirs; Shiba Sundari was merely named as a co-adjutor or overseer to act

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with and to assist Udoj Chand and was not appointed a joint shé bait under the will.

On behalf of the defendants who form the third group, it has been argued that the properties had been dedicated to the idols and the endowment created by Bhaggobutty during her life-time, that the will merely gave directions laying down how the expenses of the worship of the different idols was to be defrayed out of the different properties, and that the appointment of Udoj Chand as manager was a personal appointment only which conferred no rights on his heirs.

There can be no doubt that Bhaggobutty Dassee during her lifetime carried on the worship of the idols and defrayed the expenses out of her own property. There is however nothing to indicate or prove that all the idols were old established idols of the family, though from the will one appears to have been an ancestral idol. Bhaggobutty Dassee seems to have been a pious Hindu lady, who defrayed the expenses of the idols out of her own property during her life-time and desired to provide for the continuance of the worship after her death. There is nothing to prove that there was any endowment prior to her death.

The will, it is true, contains no specific words of bequest of the properties to the idol, but in construing its terms it is necessary to look at the document as a whole. It is addressed to Udoj Chand who is also appointed executor. It commences by directing him to carry on the worship of the idols, and then proceeds to set out the properties, the profits of which are to be appropriated in the first instance to cover the expenses. It then provides for the distribution of the surplus profits of the houses in Chowringhee and Pathuriaghata, and concludes with directions that out of the balance of the interest on the sum of money invested in Company's paper remaining after defraying the expenses of the worship, the expenses of the worship of the idol at the ghat on the river Bhagirathi were to be defrayed, and certain legacies and debts were to be paid and that the expenses of the poojah of the Issuri Saradia were to be met out of the profits of a certain garden which she had purchased in Udoj's name. In substance if not in specific terms, this amounts to an assignment or dedication of the properties specified in the will for the purpose of defraying the worship of the idols, and as such must, we think, be taken to be an endowment of those properties to the idols.

We think that the arguments which have been advanced,

fail to prove that the will merely created certain trusts on the different properties for carrying out the worship of the idols, and the beneficial interest was left to Uday Chand. The learned counsel who has appeared for Gogan Chandra Bysack, a brother of the plaintiff, has placed before us a calculation showing the total receipts and the balance outstanding after defraying the expenses of the worship of the idols, which gives a yearly balance of about 500 rupees out of a total yearly income of Rs. 4,020, a portion of which, being the surplus profits of the houses in Chowringhee and Pathuriaghatta, was to go to the three persons named in the will. The balance left over for Uday Chand would, in comparison with the sum to be spent on the worship of the idols, be so inconsiderable that it could not in our opinion support the conclusion that the intention of the testatrix was to leave the beneficial interest in the properties referred to in the will to Uday under the guise of an endowment to the idols, and subject only to inconsiderable charges for carrying on the worship. The endowment appears to have been a *bonafide* endowment of the properties to the idols, the small outstanding balance after defraying the worship going to Uday Chand.

It has however been suggested that if this view be accepted, there was in fact no provisions at all for Uday under the will, and it could not have been the intention of the testatrix to leave her heir unprovided for. The true construction of the terms of the will seems, however, to be that the principal intention of this pious Hindu lady in executing her will was to make provision for the continuance of the worship of the idols after her death, and that at the same time, she desired that the surplus profits should go in the proportion of about two-fifths to Uday, her son's son, and the remaining three-fifths to his half sister Monmohini, to her own daughter's son, and to her daughter, in equal shares for their support. This appears to be a reasonable arrangement for the lady to make and one consistent with the dictates of natural affection. We think therefore that this is a reasonable construction of the terms of the will at the outset.

We have next to determine whether under the terms of the will, Uday acquired a right to the shebaitship of the endowment, which was heritable and would pass to his heirs, or whether his appointment was personal only; whether Shiba Sundari was in fact appointed a shebait under the will; and lastly, whether the bequest of the surplus profits of the houses in Chowringhee and

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Pathuriaghatta to the three persons specified was personal or conferred on them a permanent heritable title.

In determining these questions, we have to look to the words of the will itself and not what may be suggested to have been the intention of the testatrix. In the directions contained in the will to Uday Chand to carry on the worship of the idols and in appointing him executor of the will, no words are used which can be interpreted to confer on him any heritable title. In terms the appointment as manager and executor are purely personal. It has however been argued on behalf of the defendant No. 1 Gopal Lal Sett and the parties in the same group with him, that the expression used in the will to Uday "you are to remain as malik of all the shebas" was intended to confer and in fact conferred on him an absolute title as shebait, and in support of the contention, authorities have been referred to and relied on. The result of those authorities is however to lay down that when the term "malik" is used, its meaning is to be interpreted by the context and with reference to the other clauses of the document. In the present instance, the term appears to have been used simply for the purpose of giving to Uday authority to manage and control the performance of the religious worship. It certainly gave him no title to the properties themselves, the title in which was vested in the idols. The word appears to have been used as complementary and supplementary to the directions that he was to carry on the worship of the idols and as completing his authority and can not be taken to mean that the appointment to the shebaitship was made to him and to his heirs, or that any heritable title in the office was conferred on him. No words of inheritance are used, as we should have expected to find if the intention of the testatrix was to confer a heritable title, and her intention as we have already observed, can only be gathered from the terms of the will. We must hold therefore that on a proper construction of the terms of the will, the directions appointing Uday Chand manager of the sheba must be held to be personal only and not to have invested him with any heritable title.

So far as Shiba Sundari is concerned, we think the terms of the will can not be interpreted as appointing her to be a joint shebait with Uday of the endowment, and, we hold that the contention put forward on behalf of the defendants in the second group is correct, that she was named merely as a co-adjutor of Uday for the purpose of giving him in the management of the sheba of the

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idol Ananda Moya Thakurani advice and assistance. The arguments advanced on the plaintiff's behalf that Shiba Sundari was appointed a joint shebait with Uday Chand and that as the properties were not allocated to the different idols by the will, she must be taken to have been appointed a joint shebait of the whole endowment, are not in our opinion sound. As the eldest lady of Uday's branch of the family, she would naturally have been selected by Bhaggoobutty to see that the worship was continued in the same way as it had been carried on in her life-time and to assist in the preparation of the offerings. The actual worship would apparently be performed by a Brahmin priest. The mere direction in the will that Uday Chand was to carry on the sheba of the Thakurani Ananda Moya in concert or agreement with Shiba Sundari can not be taken to amount to an appointment of her as shebait, even though she may have assisted in the preparation of the offerings to the deity and have given a voice in determining the proper way in which the worship of that special deity was to be conducted. We cannot accept as a fact that the will made no allocation of the properties to the different idols. In it, on the contrary, there are distinct directions as to the funds from which the expenses of the worship of each deity were to be defrayed.

We have now to consider whether the directions contained in the will for the distribution of the balance of the profits of the houses in Chowringhee and Pathuriaghatta, after defraying the expenses of the worship of the Thakurani Ananda Moya, amounted to a permanent bequest of the shares to the persons named and to their heirs, or merely to personal bequests to those three persons. In dealing with this part of the case, we may say at once that we think there is no substance in the argument advanced on behalf of the defendant No. 4, Shamlal Sett, and in support of which reference has been made to section 159 of the Indian Succession Act and to decisions which we have already noticed, that as there were no words of limitation in the bequest, it must be taken to be a bequest of the profits permanently and as such to have carried with it a bequest of the right to the corpus of the properties from which the profits were derived. The cases relied on in support of this argument are clearly distinguishable from the present. In those cases, the bequest was either of the interest arising on an entire fund, or of the income of an entire estate, or of a share in the entire profits, the title to the entire fund, the entire estate, and the entire profits

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remaining undisposed of. In all those cases it was held that the question ultimately for determination was the intention of the party, and in each case it was found that the intention of the party, was to convey the corpus as well as the profits to the donee. In the present case, the title to the corpus of the properties was by the will clearly conveyed to the idols, and no question can possibly arise that the bequest of the share in the profits conferred a title to the properties themselves. Certainly it did not.

What then was the effect of the bequest? In determining this question, we have again to look to the words of the will itself and in construing the will we are bound by them. In the directions in the will the three persons are specified. No words of inheritance are inserted to indicate that the bequest was to them and to their heirs and that after their death their heirs were to receive the shares in the surplus profits. Under the strict terms of the will, the bequest to each of the three persons cannot be taken to be more than a personal bequest, conferring no rights of inheritance on their heirs.

It has however been argued that in the proceedings in the previous suits the Supreme Court and this Court have held otherwise and that it is impossible in this suit to go behind or modify those findings. We have however to see whether in fact any definite decision on this point has been arrived at, which is binding on the parties in the present suit.

In his report of the 10th November 1857, the Master of the Supreme Court stated that Rs. 4,266-12-3 was due to and should be divided equally between Shama Sundari Dassi widow of Radha Kanta Sett, Golapmoni Dasse's daughters Chand Kumari and Hara Kumari, and Monmohini Dasse as being the surplus profits of the houses in Chowringhee and Pathuriaghatta. He also stated that Radha Kanta Sett and Monmohini had received Rs. 425 and Rs. 2283-15-4 respectively out of the surplus which had fallen due to them. The Supreme Court on the 14th December 1857, confirmed the report and ordered the shares in the surplus profits to be paid, one-third to the representatives of Radha Kanta Sett, one-third to the representative of Golapmoni Dasse and, the remaining one-third to Monmohini, during her life-time and to her representatives after her death. It is to be noted that Radha Kanta Sett had died in 1846 and Golapmoni in 1851.

On the 15th March 1888, in the suit brought by Hara Kumari against Tarini Charan and his co-trustee for her share in the

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surplus profits of the two houses, a decree was passed by the High Court declaring that on the account taken from the 6th January 1859 to 19th January 1886 a balance of Rs. 24,036 was found to be due as surplus profits of all the endowed properties after defraying the expenses of the worship of the idols, and of this sum Rs. 6849 were declared to represent the surplus profits of the properties devoted to the worship of Issur Gopal Thakur, and the trustee Nirmal Chandra Bysack was directed to divide that sum between the parties then entitled to it in the proportion mentioned in the decree of the Supreme Court of the 14th December 1857. It has been already noticed that in this order, a mistake has been made in stating that the surplus profits from the properties devoted to the worship of Issur Gopal Thakur were payable to the persons named, instead of the surplus profits of the properties devoted to the worship of Ananda Moye Thakurani. However, on the 28th March 1889, an order was passed directing the payment of Rs. 1,141-8, being one-sixth of Rs. 6849, to the executors of Prīanath Sett, one of the two sons of Radha Kanta Sett. It is not clear from the proceedings whether the remainder was afterwards paid to the persons held to be entitled to it, but there seem to be no grounds for holding that it was not paid to them.

Now these orders clearly directed the payment, after the death of the three persons named in the will, to their heirs and representatives of the shares in the surplus profits of the two houses which accrued both before and after their deaths, and the question arises whether they must be taken to have definitely and finally determined that the bequest of the shares in the surplus profits to those three persons was an absolute bequest conferring a heritable title to their heirs. The decision of this question is not free from difficulty owing to the conduct of the parties in the previous proceedings and to the fact that in them a proper construction of the will was never sought for. All that was apparently asked for and given was a decision as to the rights of the parties, pending the proceedings in administration of the estate of Bhagobutty Dassee, and it seems rather to have been taken for granted, than to have been decided after argument and the receipt of evidence, that the heirs and legal representatives of the three persons, to whom the bequest of the shares in the surplus was made, were entitled after the death of those three persons to the enjoyment of the same shares in the surplus profits. The question of the rights of the heirs and representatives to the

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shares in the profits under the terms of the will was however never distinctly raised in those proceedings nor definitely determined. So far as the profits are concerned, which are dealt with by those decrees and orders, we are of opinion that the parties to the present suit are bound by those orders and cannot reopen them. But now that the question of the title of the parties to the surplus profits has been definitely raised, on a construction of the will in the present proceedings, we are of opinion that we are not prevented by those orders from considering and determining the question so far as it affects the rights of the parties to the profits which have accrued since the last of those orders were passed. As we hold that under the terms of the will the bequest of the shares in the surplus profits conferred no heritable right on the three persons named, so therefore we hold that in the present suit the parties who claim shares in those profits as heirs of those three persons have failed to make out a valid title, and consequently that those surplus profits of these two houses must be regarded as part of the general assets of the trust estate created by the will.

The questions which now remain for consideration on a construction of the will are, when did the succession to the shebaitship open, and who of the several claimants in the present suit is entitled to the shebaitship of the endowment. From the findings at which we have already arrived, the conclusion follows that the succession to the shebaitship opened on the death of Uday Chand. He was the only person who was appointed to that office by the will, and his appointment was purely personal and transmitted no rights to his heirs. In order then to determine the right to shebaitship as between the present claimants, we have to determine who was the preferential heir to Bhaggobutty on the death of Uday Chand.

We may say at once that in our opinion the contention is correct that, in the absence of any directions to the contrary in the will, the right of inheritance to the shebaitship follows the same line as the right of inheritance to immovable property. Now, on the death of Uday the following persons were alive, through whom the right to the shebaitship has been severally claimed by the different groups of parties in the present suit: Lakhimoni his daughter then a child of a year old, Joy Kristo Bysack the lunatic son of Bhaggobutty, Radha Kanta Sett the daughter's son of Bhaggobutty and Radha Kristo Bysack the son of Kanakmoni Dassi the co-wife of Bhaggobutty.

Lakhimoni being the daughter of a grandson of Bhaggobutty was certainly not the heir to her stridhan property in preference to the daughter's son, Radha Kanta Sett. The claim therefore of Gopal Lal Sett defendant No. 1 and his brother Kanai Lal Sett to the shebaitship by right of inheritance fails. Nor has Gour Hari Bysack defendant No. 2 any title to it, he being a descendant of the half-sister of Udooy, Monmohini Dassee.

The separate claim set up by defendants Nos. 7 and 8, the sons of Nirmal Chand, to the shebaitship on the ground that the succession passed to Joy Kristo Bysack the lunatic is also untenable. In our opinion, the contention advanced by the learned counsel on behalf of the descendants of Radha Kanto Sett the third group of parties, is supported by authority that, whatever may be the case in Bombay, it has been established in Bengal that insanity at the time the inheritance falls in is sufficient to exclude from the succession even though the lunacy may not have been congenital, and that where the succession to an office is in question, the duties attached to which require that the holder shall be in full possession of his senses, lunacy is certainly sufficient to disqualify a person from succeeding. Nothing was heard of the right of Joy Kristo to succeed to the shebaitship till the present trial, and we are of opinion that the claim has no real substance.

The fact that the right of Joy Kristo to succeed to a share in the property left by his brother Raj Kristo, on the death of Raj Kristo's widow in 1847, was successfully contested on his behalf by his committee in 1849 cannot be taken to support the claim that Joy Krisisto had a right to succeed to the shebaitship. The succession in that case opened on the death of Raj Kristo in 1821, and, though the mind of Joy Kristo is said to have become deranged in that year, he was not declared to be a lunatic till 1840 when a commission for that purpose was issued. He was not a lunatic, therefore, at the time when the succession opened in that case.

There remain then the two sets of parties, *viz.*, the plaintiff and the defendants in his group, and the defendants who are the descendants of Radha Kanto Sett and who form the third group, and the dispute between these two groups involves the decision of the important question, whether the daughter's son or the son of a co-wife, as being the preferential heir to the *ayautuka* stridhan property of Bhaggobutty, had a prior right to the shebaitship, when the succession opened on Udooy's death.

In support of their contention that the son of the co-wife is

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the preferential heir, the plaintiff and the members of his group rely on verse 33 of section 3 Chap. IV of the Dayabhaga and contend that the text is a binding authority on that point and must be preferred to the opinion expressed by the different commentators.

The other party contend that the verse 33 on which the plaintiff relies is a palpable interpolation in the text, and that, following the directions of the Privy Council in the case of *Collector of Madura v. Mutthu Ramalinga Saththupathy* (1), we ought to ascertain whether the doctrine propounded in that verse has been received in Bengal and sanctioned by usage. It is argued that the verse is out of place in chapter IV, section 3, which deals with the rights of childless widows, and that it is contrary to the principles which have been accepted as governing the line of succession to Stridhan property. Those principles are that the succession primarily goes to the descendants of the deceased lady, following the line of propinquity and being governed by natural affection, and that it is not exclusively controlled by the doctrine of spiritual benefit.

In dealing with this question, we are of opinion that it is impossible to accept the argument advanced by the counsel for the plaintiff that the text of the Dayabhaga by Jimuta Vahana must be regarded as in itself an authority absolutely binding on us without regard to the fact whether the doctrine propounded in the text has been accepted as a true exposition of the law and has been sanctioned by usage and without entering into a consideration of the question whether the verse of the Dayabhaga on which reliance is placed bears on its face evidence of being spurious and an interpolation.

It is not disputed that for two centuries posterior to the publication of the Dayabhaga by Jimuta Vahana, no mention is made of the son of a co-wife as the heir of the stridhan property of a Hindu female. Of the learned commentators who have expounded the Dayabhaga, Srinath Acharjya Churamoni and Ramabhadra make no mention of that portion of the text which occurs in Chapter IV, Sec. 3, verses 31, 32 and 33 of the Dayabhaga by Jimuta Vahana in which the right of the son of the co-wife is dealt with, and ignore the right of the son of the co-wife entirely. Achyuta Chakrabarti considers the reading of the text to be questionable, while Maheshwara pronounces it to be spurious because otherwise there would be a conflict between that passage

(1) (1868) 12 Moore I. A. 397; 10 W. R. P. C., 17 at 21.

and verses 11 and 12 of section 2 of the same chapter of the Dayabhaga which was not possible of reconciliation : he is of opinion that verse 31 of section 3 merely gives a list of the heirs without attempting to lay down the order of succession, and in support of this view refers to verse 38 of the same section. He further expresses the opinion that as the step-son is not the issue of the body of the deceased lady, no spiritual benefit could accrue to her from a *pinda* offered by him to his father. Sri Krishna Tarkalankara attacks verse 33 as an interpolation and condemns it as spurious. In his Daya Krama Sangraha, Chap. XI, section 4, verses 7 and 8, he places the daughter's son after the son's son, relying on the text of Manu that "a daughter's son delivers him in the next world like the son of a son." The great-grandson is placed next and then the son of the co-wife.

It is clear, therefore, that at the outset the balance of authority, so far as it rests in the commentators, is opposed to the view that verse 33 of Chapter IV, section 3 of the Dayabhaga by Jimuta Vahana correctly lays down the line of inheritance.

We may add that the view taken by Achyuta and Maheswara, namely, that the particular text of the Dayabhaga is corrupt and probably spurious, receives support from an examination of the manuscripts available. Thus, although two manuscripts (Nos. 153 and 580) in the Library of the Government Sanskrit College at Calcutta support the reading in the printed edition, another manuscript in the same Library (No. 154) gives the contrary reading, makes no mention of the step-son, and places the daughter's son immediately after the son's son. On the other hand, one of the manuscripts (No. 4478) in the Government Collection,* mentions not only the stepson but also his son as entitled to preference over the daughter's son. In this conflict of readings, it is impossible in our opinion to hold on the printed text that the step-son succeeds in preference to the daughter's son.

Coming down to the later authorities, we find that Shyama Charan Sarkar in his Vyavastha Darpana (verses 282 and 283) gives the daughter's son preference in the line of succession to the son of the co-wife (see table of inheritance at page 262), and approves of the view taken by Sri Krishna that verse 33 of Chapter IV section 3 is an interpolation. Jogendra Smarta Siromoni in his Commentary on the Hindu Law* (at page 393), adopted the line laid down by Sri Krishna. Jogendra Nath Bhattacharyya in his Commentaries on Hindu Law notices (at page 590) the conflict between verses 11 and 12 of Chapter IV

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* Deposited in the Library of the Asiatic Society of Bengal.

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section 11 of the Dayabhaga by Jimuta and verse 33 of Chapter IV, section 3 and accepts the order of succession as laid down by Sri Krishna. Sir Gooroodas Banerjee in his lectures on the Hindu Law of Marriage and stridhan (at pages 399-401) accepts the same view. Golap Chandra Sarkar Sastri in his treatise on Hindu Law (page 414) gives the line of inheritance as laid down in the Dayabhaga Chapter IV, section 3 verse 33, but is careful to point out that as there is a doubt as to the authenticity of that passage in the Dayabhaga, the order of succession given in it can only be taken as provisional. On the whole, therefore, later authorities also go to support the view that verse 33 of section 3 of Chapter IV of the Dayabhaga of Jimuta is an interpolation.

Lastly, we have to take into consideration the passage itself and its context, and see how far they go to support its genuineness as a true exposition of the law. Taking the edition of the Dayabhaga as translated by Colebrooke, we find that Chapter IV, section 2 deals with "the succession of a woman's children to her separate property" and verses 11 and 12 place the daughter's son as next in succession to the son's son. Chapter IV, section 3 deals with "the succession to the separate property of a childless woman." Verses 1 to 30 deal with the heirs down to the husband. Verse 31 commences by stating that on failure of heirs down to the husband, Vrihaspati has laid down that "the mother's sister, the maternal uncle, the father's sister, the mother-in-law, and the wife of an elder brother are pronounced similar to mothers." Then occurs the passage which has been used to introduce verses 32 and 33. It runs as follows: "if they have no issue of their bodies nor son of a rival wife, nor daughter's son, nor son of those persons, the sister's son and the rest shall take the property." Following the sequence of the sentence, the word "they" in the passage "if they have, etc.," would naturally refer to the persons previously specified in the section. Verse 32 however proceeds to explain verse 31 in a sense absolutely inconsistent with the context. The learned author is dealing with the line of succession to a childless woman. There can, in the case of such a person, be no question of "any issue to her body." The explanation which attempts to deal with the issue of a childless woman is clearly out of place and meaningless. Then follows verse 33 which commences by raising the hypothesis which is impossible having regard to the nature of the matter being dealt with in the Chapter. It runs thus:—"If there be no legitimate son or daughters" etc.; a childless

woman however could not have either the one or the other, nor could a childless woman have a grandson in the male line. The whole verse is impossible of reconciliation with the context, and the concluding portion by which the daughter's son of a childless woman is postponed in the line of succession to the son of a rival wife is, on the face of it, impossible to understand. The right of a daughter's son to succeed could never come into question in dealing with the property of a childless woman. The verse 33, as it stands, is clearly out of place, and construed by the context is meaningless.

The learned counsel for the plaintiff has, however, argued that if the verse be an interpolation, it is a very clever one, as otherwise the son of the rival wife is given no place in the line of succession. There seems little doubt that the verse is an interpolation, and in our opinion it is a very clumsy interpolation. It is made at a place in which by no process of reasoning it can be made to fit, and moreover it creates a contradiction impossible of reconciliation with the line of succession as laid down in the section of the Chapter immediately preceding it (see verses 11 and 12 which deal with the succession of a woman's children to her separate property). If, on the other hand, the words "of the rival wife" be omitted from the last passage in verse 31, the passage is consistent with that which precedes it, and if verses 32 and 33 be struck out, verse 34 follows verse 31 in natural and intelligible sequence. For all these reasons, in our opinion it is clear beyond reasonable doubt, both from the passage itself and the context, that verses 32 and 33 and the words "of the rival wife" in verse 31 are interpolations and spurious, and therefore they do not give a correct exposition of the law.

All these circumstances and the balance of authority entirely support the conclusion that the verse 33 on which the plaintiff relies is a spurious interpolation; the contention advanced on his behalf, which relies on the authenticity of that verse, that the son of the rival wife is a preferential heir to the daughter's son in the line of succession of the *ayautuka stridhan* property of a Hindu female, fails. We therefore hold that in the present case the third group of parties, *viz.*, the descendants of Radha Kanta Sett, the daughter's son of Bhaggobutty Dasse, have a title to the shebaitship of the endowed properties preferential to the plaintiff and the defendants grouped with him who are descendants of Radha Kishen, the son of the rival wife.

The result of the foregoing findings is that we dispose of the issues framed by the parties as follows :

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1. For the purposes of this case we have only to determine who was the preferential heir to the *ayautuka stridhan* property left by Bhaggobutty when the succession opened in 1842 on the death of Uday Chand, and we find that the heir was her daughter's son Radha Kanta Sett. *By her son Radha Kanta Sett.*
2. Uday Chand was under the will of Bhaggobutty appointed executor of the will and shebait of the endowed property for his life-time only.
3. Uday had no power to appoint successors to the shebaitship by his will.
4. Shiba Sundari was not a co-shebait with Uday Chand and she did not succeed him as shebait. She was appointed by the High Court to carry on the worship of the idols in accordance with the trusts created by the will as a temporary arrangement pending the administration of the estate of Bhaggobutty Dassee.
5. This issue is disposed of by the findings on issue 4.
6. This issue is similarly disposed of.
7. On the death of Uday Chand, the right to the shebaitship devolved on Radha Kanta Sett, the daughter's son, and therefore the preferential heir of Bhaggobutty Dassee.
8. Joy Kristo Bysack was a lunatic at the time of Bhaggobutty's death, having been declared to be so on a commission issued in 1840. He was also a lunatic when the succession to the shebaitship opened on the death of Uday and so was permanently excluded from the succession.
9. Joy Kristo was incapacitated by lunacy from succeeding both to the stridhan of his mother and to the shebaitship.
10. The right to the shebaitship had not been determined up to the institution of the present suit.
11. The orders passed by the Supreme Court and the High Court in the course of the previous suits and proceedings were merely orders appointing trustees to carry on the worship of the idols in accordance with the trusts created by the will of Bhaggobutty Dassee pending the conclusion of the administration of her estate.
12. Neither Behari Lal Sett nor any of the descendants of Radha Kanta Sett are bound by the orders passed in those suits and proceedings so as in the present suit to be debarred from asserting their right to the shebaitship of the endowed property.
13. The question of the distribution of the surplus income of the houses in Chowringhee and Pathuriaghatta is *resjudicata*, so far only as those surplus profits accrued prior to and up to the 16th January 1886 and are covered by the decree passed on the

14th December 1857 and the 15th March 1888 and by the orders passed in execution of those decrees. The question of the right to the surplus profits subsequent to 16th January 1886 is not *res-judicata*, but is open to determination in the present suit.

14. Bindubashini is not entitled to any share in the surplus profits which have accrued since the 16th January 1886.

15. Bhaggobutty Dassee disposed, by her will, of all the *stridhan* property of which she died possessed and that question was finally determined by the Supreme Court. Under her will, she created, in favour of the idols named therein, an endowment of the whole of her *stridhan* property.

16. Gopal Lal is not entitled to be a shebait.

17. The succession to the shebaitship opened on the death of Uday Chand.

18. The question raised in this issue was not pressed, the decision of the Supreme Court having been accepted as final that all the *stridhan* property left by Bhaggobutty Dassee was her *ayantuka stridhan*.

19. Shiba Sundari was associated with Uday Chand only for the purpose of assisting him with advice in conducting the worship of the idol Ananda Moye Thakurani and of no other idol.

20. The Thakurs dealt with in the will are Issur Thakur Gopal Lalji, Issur Thakurani Ananda Moye, and the Thakur whose shrine stood on the banks of the Bhagirathi river.

21. The will directs that the expenses of the worship of the Thakurani Ananda Moye are to be defrayed from the profits of the two houses in Chowringhee and Pathufiaghatta, that the expenses of the worship of the Thakur Gopal Lalji are to be defrayed from the profits of the garden called Gopal Lalji's garden in Sinti, and the worship of this Thakur as well as of the Thakur at the ghat on the Bhagirathi river are also to be defrayed from the interest of the money invested in Government paper. There is a further provision that the expenses of the Pujah of Issuri Saradea will be defrayed from the profits of two baitakhana houses purchased by Bhaggobutty Dassee in the name of Uday Chand.

22. This issue, on the findings at which we have arrived, really requires no answer; we hold however that there was no estoppel.

23. It has not been established that any expenses have been incurred by defendants Nos. 7 and 8 on the worship of the

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Thakurs since the 16th January 1886 up to date. If they have incurred any expenses they are entitled to have them defrayed out of the assets of the trust estate: and we direct the Registrar to make an inquiry into this matter and to ascertain and report what sum, if any, is due to defendants 7 and 8 out of the trust estate from the 12th April 1892. If any sum should on such enquiry be found due to them and so reported to this Court, it will be open to the shebaita to put in an application, if so advised, for the purpose of ascertaining what if any shares belonging to the trust estate were in the hands of Nirmal on the 12th April 1892 or have from time to time come into his hands against which the sum so found might be set off.

24. This issue calls for no answer in this suit, as we hold that Joy Kristo inherited no title to the shebaitship when the succession opened on the death of Uday Chand.

25. Shiba Sundari was not a shebait of Ananda Moya Thakurani and defendants Nos. 7 and 8 are not now entitled to the shebaitship of that idol.

26. This issue cannot be answered on the materials now before us.

The result therefore of the above findings is that we hold that the right to the shebaitship of the endowed property lies with defendants forming the third group, namely the descendants of Radha Kanta Sett. It seems however desirable that, in order to provide for the due carrying out of the trust created by the will, a proper scheme should be framed for carrying on the trust.

The shebaita and the present living representatives of Bhaggobutty Dasee will put in a scheme, if agreed, or schemes, if not, for carrying out the trust for the approval of the Court within four months of this date. Copies of the scheme or schemes will be furnished to the plaintiff who will be heard with regard to them, if he so desires it, before the scheme is finally approved.

Lastly, we have to deal with the question of costs. The plaintiff has no doubt failed in this suit, so far as his claim to the shebaitship is based on his right by inheritance. The object of the suit was further to have the will of Bhaggobutty Dasee construed with the view that the trusts created thereby, which have been allowed to fall into neglect, might be properly enforced, and a scheme framed for the due administration of the trust and for the performance of the religious ceremonies for which the trust was created. The defendants who are descendants of Radha Kanta Sett and whose right to the shebaitship has been established to

the satisfaction of this Court, have never interested themselves to secure the assertion of their rights and in this suit have appeared as defendants only, and in their defence they have raised a cross claim. Though they have succeeded to the extent that their claim has been allowed, they cannot be held to be entitled to their costs in supporting a claim which they never attempted by any independent action to enforce. The defendant Gopal Lal by virtue of his appointment as co-trustee was a necessary defendant to the suit, and in consequence of his position has set up an independent claim. He is not in the position of a person who has needlessly opposed the plaintiff's suit, though both he and the plaintiff have failed to establish their claims to the shebaitship.

Really, in the present case, there are only three groups of opposing parties, and under these conditions it was quite unnecessary for the different members forming these groups to be represented in this case by separate counsel. The result has been rather to embarrass us in the decision by the introduction of conflicting and inconsistent arguments, and, as in the case of Kanai Lal, to advance contentions which had afterwards to be withdrawn as untenable. The fact that in the previous proceedings the Court directed that the costs of the parties should be paid out of the trust estate appears to have encouraged the different members of the different groups to come forward with separate counsel and separate cases in the belief that not they but the estate would suffer in the event of their failure.

We do not think that in the present case we ought to debit the costs of the parties against the funds to the credit of the trust. The plaintiff appears to be the only person who has taken any interest in securing the due performance of the trusts created by the will, but as he has failed to establish his claim to the shebaitship he is not entitled to his costs out of the trust property. We consider that the conduct of the different parties to the suit disentitles all of them to recover their costs from the trust property, and we accordingly direct that all the parties do bear their own costs, except that the plaintiff do pay the costs of the infant defendants, of and incidental to the appointment of their guardians.

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PRIVY COUNCIL.

PRESENT :—*Lord Robertson, Lord Atkinson, Lord Collyers, Sir Andrew Scoble and Sir Arthur Wilson.*

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MAHOMED ALI HAIDAR KHAN AND ANOTHER,

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v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.]

Regulation III of 1891 (the Sylhet Jhum Regulation).—Considerations of law involved in the process of reasoning—Jhum cultivation, nature of—Government's claim to confiscate proprietary rights—Burden of proof—Proprietary title—Long possession and enjoyment.

When lands have long been in the enjoyment of the zemindar and it is asserted by Government that they are entitled to confiscate the proprietary rights upon payment of compensation under Reg III of 1891, the *onus* is upon the Government to show that the facts of the case are such as to bring it within the operation of the Regulation.

To bring a case within the Regulation it is not sufficient to show that at the time of the Permanent Settlement the income from *Jhum* cultivation was taken into account as asset for purposes of assessment; it must also be shown that the income taken into account was derived from *Jhum* cultivation carried on beyond the limits of the settled estate.

The question whether *Jhum* lands lay within or without the limits of the settled estate is not necessarily a question of fact, specially if at every point in the process of the reasoning considerations of law have to be regarded.

Long possession of land in assertion of a particular title may be relied upon as proof of that title.

Appeal from a judgment and decree of the High Court of Judicature at Fort William, in Bengal (March 29, 1904) which affirmed a judgment and decree of the Court of the Subordinate Judge of Sylhet (April 15, 1899).

The principal questions raised on the appeal were the nature and extent of the appellants' rights over the land in suit and the application thereto of Regulation III of 1891.

On May 16, 1891 the Sylhet Jhum Regulation (III of 1891) was passed. Material parts of the Regulation are set out in their Lordships' judgment. In the exercise of the power vested in him by the Regulation, the Commissioner of Assam, on July 25, 1891

notified in the *Assam Gazette* that the Regulation would be put into force in certain areas from the 1st October following. Among the tracts of land to which the notification related, was the area, which was the subject of the present litigation, and was known as Mouzah Puber Pahar situated on the eastern border of Pergunnah Langla in the Sylhet District.

On April 13, 1897, Mahomed Ali Amjad Khan instituted the suit in the Court of the Subordinate Judge of Sylhet. The defendants were the Secretary of State for India in Council, and nineteen persons who, jointly with the plaintiff, held fractional shares in the villages described in Schedule V annexed to the plaint. The plaintiff alleged that he was the sole owner of certain villages described in Schedule IV, attached to the plaint, and part owner of certain villages described in Schedule V; that the land described in Schedule II appertained to the taluqs mentioned in Schedule IV, and, the land described in Schedule III to the taluqs mentioned in Schedule V of the plaint; and that he was still in possession of the lands. The entire tract in dispute was described in Schedule I to the plaint. The plaintiff claimed to be the sole and exclusive owner of the land of Schedule II, and to be part owner of the land of Schedule III on the grounds that the lands in dispute (known as the lands of Puber Pahar or Eastern Hill) were part and parcel of the permanently settled lands described in Schedules IV and V attached to the plaint, not lands in which he and his co-sharers had merely the Jhum rights, and that by adverse possession for over 60 years he had acquired a title against the Government. The plaint also stated that under the Permanent Settlement, the settlement-holders of those estates were given absolute proprietary right to the land described in Schedule I; and that the highest Revenue Authorities had decided that those lands appertained to the permanently settled estates. The plaint further alleged that the Regulation III of 1891 was *ultra vires* and that in any event it had no operation on the rights of the plaintiff, and prayed for, among other things, the following declarations:—

(a).—That on a declaration that the land of Schedule I, does not come within the purview of the Sylhet Jhum Regulation, a decree may be awarded confirming the plaintiff's absolute proprietary right and the right created by possession over 60 years in respect of the whole of the land of Schedule II and of

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10 $\frac{152827}{933837}$ gundahs share of the land of Schedule III.

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(b).—That a decree may be awarded declaring that notification No. 2788 issued by the Chief Commissioner of Assam and published in the *Assam Gazette* of the 25th July 1891 have not affected and could not affect the plaintiff's right and possession in respect of the disputed lands under the Permanent Settlement and by virtue of possession for over 60 years.

In his written statement, dated September 11, 1897, the Secretary of State for India in Council denied that the lands in suit were included in the taluqs or estates named or that the plaintiff had acquired any title to the land by adverse possession. With reference to the other allegations made in the plaint, it was stated, in answer, that all that the highest Revenue Authority admitted was that the plaintiff had Jhum rights attached to the lands in dispute, but it was contended that, even if it were admitted that the plaintiff and his co-sharers really had such Jhum rights they had been extinguished by Regulation III of 1891.

The Subordinate Judge framed eight issues, of which the three following are material :—

5th :—Whether the lands specified in Schedules II and III appertain to the taluqs mentioned in Schedules IV and V of the plaint respectively ?

6th :—Whether the land in dispute does not lie within the limits of the permanently settled estates and therefore it comes within the operation of the *Jhum* Regulations ?

7th :—Whether the plaintiff has acquired any title to the disputed land by adverse possession and whether the plaintiff is in possession of the same or not and whether the plaintiff has the alleged share in the land specified in Schedule III of the plaint or not ?

The documentary evidence relied upon by the plaintiff may be summarised as follows :—

The records of the decennial settlement afterwards made permanent were not forthcoming, but the Mauzawari papers for the year 1208 B. S. (1801-1802 A. D.) showed that the income derived from Puber Pahar was included in the collections of the villages described in Schedules IV and V of the plaint, and the Mauzawari papers for the years 1209 B.S. (1802-1803 A.D) and 1236 B.S. (1829-1830 A.D.) contained the following remarks :—

“This quantity is estimated by sight only, but it may be less or more on inquiry being made in the Pergunnah. The *dastur* of *Jhum* cultivation is this :—*Jhum* is not cultivated in

one place every year. When land is found anywhere within these boundaries *Jhum* cultivation is made thereon, and after measurement and assessment the Mirasdars take the rest by apportionment according to their respective shares in the *Jhum* revenue at the time of the *hastbud* measurement. This hill is Jummai."

The latter statements referred to Mouzah Puber Pahar, and purported to be statements "of mahals chuckla Sylhet, except the abadi and jungle lands of taluks, belonging to Mirasdars according to the *hastbud* prepared by Mr. John Willes."

There was documentary evidence to show that from 1837 the plaintiff's predecessors in title received kabuliyats from persons carrying on *Jhum* cultivation on the lands in question.

About the year 1840 the Government granted a lease of certain lands, not settled at the time of the permanent settlement, to Crum Singh Hazari and Crobind Singh Hazari. The lands leased were in the neighbouring pergunnah Patharia. The lessees made an attempt to realise rents from tenants cultivating in Puber Pahar. Gour Ali Khan, the predecessor in title of the plaintiff, made objections, which were, on December 14, 1842, decided in his favour by the Munsif of Hingajia, who held that "it was satisfactorily proved that the *Jhum* lands, on account of the disputed rents as stated by the plaintiffs, belong to the jammai taluqs possessed by the Mirasdars of Langla Pergunnah." That finding was affirmed on appeal by the District Judge of Sylhet by judgment dated May 20, 1843.

After inquiry an order was made on September 18, 1848, excluding Mouzah Puber Pahar as lands permanently settled from the area of land claimed by the Government, as land in regard to which a settlement was still to be made.

Later on further measurements were made of the Government lands, and in the maps prepared a large area of Puber Pahar, was included. On objection the Revenue Commissioner of Dacca ordered the exclusion from the map of the area claimed as part of the estate of the plaintiff.

On September 14, 1855 the Board of Revenue again affirmed the title of the Plaintiff, and directed a refund of all moneys wrongly collected by the Government.

In the year 1860, some portion of Puber Pahar was again included in maps prepared of the Government lands, and was released by an order dated February 28, 1861.

Since then the plaintiff remained in undisputed and undisturbed possession of Puber Pahar.

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On April 15, 1899, the Subordinate Judge delivered his judgment. He decided that the plaintiff failed to show that the disputed land was included in the permanently settled estates, and it necessarily followed that it did not appertain to the taluqs, or estates, mentioned in Schedules IV and V of the plaint; and that the land in dispute was beyond the limits of the permanently settled estates, and therefore that land came within the operation of Regulation III of 1891. On the question of possession he was of opinion that the leases and accounts filed by the plaintiff were genuine. The earliest lease was dated December 28, 1837, and he considered that possession for 60 years was, therefore, not proved. He was also of opinion that the nature of the acts of possession indicated a casual interest and not an absolute interest in the land which could by prescription mature into ownership. In consequence of those findings he made a decree dismissing the plaintiff's suit with costs.

The plaintiff Mahomed Ali Amjad Khan died *pendente lite* and on his death his heirs and legal representatives Mahomed Ali Haider Khan and Mahomed Ali Asgar Khan, minors through their next friend L. W. Lydiard, manager under the Court of Wards, were brought on record.

Against the decree of the Subordinate Judge the appellants appealed to the High Court of Judicature at Fort William, in Bengal, which Court delivered its judgment on March 29, 1904, and agreed with the Subordinate Judge that the appellants failed to prove that the lands in suit lay within the boundaries of his permanently settled taluqs. The Court, therefore, decided that the appellants did not prove that a permanent settlement of the lands in dispute had been made with their predecessors in title, and that the rights exercised by them over those lands were not exercised in such a manner as to confer a title by adverse possession. In the result a decree was made dismissing the appeal with costs.

Against the decree of the High Court the appellants appealed to His Majesty in Council. Of the respondents only the Secretary of State for India in Council appeared.

Sir Robert Finlay, K.C., and Mr. DeGruyther, K.C., for the Appellants, referred to the Assam Code (Ed. 1897) the Sylhet Jhum Regulation, 1891 (Regulation III); Regulation I of 1793, s. 10; Regulation VIII of 1793, ss. 23-25; the fifth report from the Select Committee on the affairs of the East India Company, Vol. I, Bengal Presidency, (Madras Edition, 1883), pp. 14, 18, 21,

22, 23 (top of), 130, 139, 146 (recommendation), 147, 150, 568 (third resolution), 569, 571 (fifth resolution), 580, 585, 592, 609, 611, 613, 616, 626 and 630; the Assam Land Revenue Manual, by E. A. Gait, (Calcutta Edition, 1896), pp. CXXV (refers to the permanent settlement in Sylhet), CXXVIII (refers to the settlement of the Sylhet District carried out by Mr. Willes), CXXIX, CXXXII, CXXXIV, 132 and 137; and Directions for Revenue Officers in the North-Western Provinces of the Bengal Presidency (Calcutta Edition 1850). The officers of Government, who made settlements, were allowed to take into account only assets arising out of the estate. They could not lawfully take into account any asset that did not arise out of the estate. The evidence clearly shows that profits of the lands in suit were taken into account in settling the appellants' taluks. It must be presumed that in this case the officers of Government duly followed the course laid down by law and included the profits of the lands in suit in estimating the assets of the appellants' taluqs because the land formed part of the appellants' estate. The land in suit is, therefore, beyond the scope of Regulation III of 1891. It is for the Government to show that the lands in suit are 'beyond the limits of' the appellants' estate, and unless the Government succeeds in showing that the lands are so situated, the appellants are entitled to succeed. Whether the lands in dispute are within or 'beyond' the limits of the appellants' estates is not merely a question of fact. In the consideration of that question, as already shown, considerations of law are involved.

The Mouzawari papers for 1802-1803 and 1829-1830 show that the lands in dispute were included in the appellants' estates as Mirasdar, i.e., proprietor and was assessed to revenue as such. From the date of the Settlement the appellants and their predecessors in title have held continuous possession of the lands, received rents realised therefrom and paid revenue originally assessed thereon. The word Jhum means a hill or forest village. The cultivation in such a village would naturally be shifting. There is nothing in the word itself, or its use, to indicate that a hill or forest village cannot form a portion of Zamindar's estate to which his title was recognised at the permanent settlement. After a review of the whole of the evidence it was submitted that the evidence on record proved the title of the appellants and that the decree of the High Court should be reversed. For the meaning of the word 'mahal' reference was made to the Regula-

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tions of the Bengal Code, by C. D. Field, (Calcutta Edition, 1875) Introduction, p. 25.

Mr. Cohen, K. C. and Mr. Ross, for the Respondent the Secretary of State for India in Council : Regulation III of 1891 is passed under the authority of 33 Vict. c. 3, and is not *ultra vires*. A reference to the Preamble of Regulation III of 1891 and the Assam District Gazetteer, Vol. 2, Sylhet, pp. 212 et seq., shows that the contention that there is a strong presumption in this case that the lands in suit formed part of the appellants' taluqs because the officers of Government, who made the assessments, were not allowed by law to take into account the profits of any land that did not form part of the estate settled, is untenable. It is clear from these authorities that the officers making permanent settlement in the District of Sylhet did include among the assets of the estates settled 'the income then derived by the proprietors of those estates from shifting cultivation' carried on by them *beyond the limits of those estates*. The lands in dispute are beyond the limits of the appellants' taluqs. It is for the appellants to show that those lands are within the limits of their taluqs. Both Courts in India have laid the burden of proof on the appellants and come to concurrent findings that the appellants have failed in proving that the lands in suit were within the limits of their permanently settled estates.

(LORD COLLINS : Concurrent findings seem to be conjectures, not findings.)

Mr. Cohen : The question whether the lands are within or beyond the limits of the appellants' settled estates is treated in both Courts in India as a question of fact. The first time it was contended that it was a question of law is when the appellants presented their petition to the High Court for leave to appeal to His Majesty in Council. It is now too late to allow the appellants to raise that contention and it is submitted that such a contention is not open to them. There are also concurrent findings of the Courts in India, that the appellants failed to prove, as contended in their plaint, their title to the lands in suit by adverse possession of 60 years. It is submitted that the documentary evidence on record, taken as a whole, clearly shows that the officers who effected the permanent settlements of the appellants' taluqs, included, for the purposes of assessment among the assets of those taluqs, under the name of Jhum, the income then derived by the proprietors of those taluqs from shifting cultivation, carried on by the proprietors or their dependants beyond the

limits of those taluqs ; and further, that the areas of such cultivation were altogether undefined, and varied in different years. The lands so undefined could not be and were not, included in the settled areas ; and it is further submitted that this state of things is exactly what the Legislature contemplated when Regulation III of 1891 was passed. The decrees of the lower Courts are right and ought to be confirmed.

For the meaning of the word 'mahal' reference was made to the Glossary of Indian Terms by Wilson.

Mr. DeGruyther replied.

The judgment of their Lordships was delivered by .

Sir Arthur Wilson :—This is an appeal against a judgment and decree of the High Court of Calcutta, dated the 29th March 1904, which affirmed the judgment and decree of the Subordinate Judge of Sylhet, dated the 15th April 1899.

The question raised upon the appeal is whether Regulation III. of 1891, issued under the authority of the Act 33 Vict., C. 3, can properly be applied in the case of certain lands known by the name of Puber Pahar.

The regulation in question begins with a most useful preamble, which recites as follows :—

Whereas the officers who effected the permanent settlements of certain estates in the district of Sylhet included, for the purposes of assessment, among the assets of those estates, under the designation of *jhum*, the income then derived by the proprietors of those estates from shifting cultivation carried on by them or their dependants beyond the limits of those estates, and from tolls levied by them on forest-produce cut, gathered or enjoyed in places beyond the limits of those estates ;

And whereas, inasmuch as the said cultivation and the operations of those who cut, gathered or enjoyed the said forest produce shifted from year to year over immense and altogether undefined areas, the tracts of land over which they extended were not specified at the time of the settlement, and, in consequence of this, rights of various, and in some cases vague, descriptions are from time to time asserted by the said proprietors over immense and undefined areas ;

And whereas it is thus impossible for any person to obtain a safe and clear title to land in those areas, and the extension of cultivations is, in consequence, impeded ;

And whereas it is expedient that the rights, if any, corres-

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ponding to the said *jhum* assets should be commuted.

Section 2 enacts that :—

All rights . . in respect of which *jhum* . . assets were assessed in any permanent settlement of land, or which have been at any time acquired by virtue of or under cover of such assessment shall be deemed to have been extinguished.

And Section 3 declares that all proprietors of such estates shall be entitled to compensation.

The nature of *jhum* cultivation is explained in an early official document relating to the hill lands in question :—

“ That the *dastur* of *jhum* cultivation is this : *jhum* is not cultivated in one place every year. When land is found anywhere within these boundaries *jhum* cultivation is made thereon, and after measurement and assessment the Mirasdars take the rest by apportionment according to their respective shares in the *jhum* revenue at the time of the *hastbud* measurement.”

And that description seems to be correct to the present day.

After the passing of the Regulation the Government of Assam, whose jurisdiction included Sylhet, issued and published orders in due course, extending the Regulation to the areas in question, with others.

The question, therefore, raised in the case and discussed on this appeal is whether the Regulation can be put in force with reference to the lands to which it is sought to apply it. Those lands have undoubtedly been long in the enjoyment (such enjoyment as is practically possible under the circumstances of the case) of the appellants' predecessors in title. The Government claims to apply to these lands a Regulation which would have the effect of confiscating proprietary rights, and giving compensation in exchange. Under these conditions their Lordships think it clear that it lies upon the Government to show that the facts of the case are such as to bring it within the operation of the Regulation—in other words, that the present case is one in which, at the Permanent Settlement, in making settlement of certain taluqs with the appellants' predecessors in title, the officers of Government included, for the purposes of assessment, among the assets of those taluqs the income derive by their owners from *jhum* cultivation carried on beyond the limits of the settled estate.

That the taluqs now held by the appellants were settled at the Permanent Settlement is beyond dispute, and that

the estimating the assets of those taluqs the profits of the present *jhum* lands were then brought into account is also beyond dispute. But according to the appellants those profits were taken into account because the *jhum* lands formed part of the settled estate; while, according to the other side, the *jhum* land profits were taken into account as assets accruing to the owners of the settled estate, but derived from lands lying outside it. The question is which of these views is to be accepted.

It was contended on behalf of the Secretary of State that the question whether the *jhum* lands lay within or without the limits of the settled estates was a question of fact, and that their Lordships should accept the concurrent findings of the two Courts in India. This contention their Lordships are unable to accept. In a sense, the question is one of fact; but at every point in the process of the reasoning considerations of law have to be regarded.

It was contended on the other side that, under the Regulations in force at the time of the Permanent Settlement, no assets could lawfully be taken into account in settling the jumma of an estate, except those arising out of the estate itself; and that this consideration established a very strong presumption that in any individual case the course in accordance with law had been followed. But this contention was met, and in their Lordships' opinion effectively met, by a reference to the preamble of the Regulation under consideration. That preamble shows that the course said to have been impossible was in fact followed, rightly or wrongly, and followed in a number of cases sufficient to render legislation desirable. It remains, however, to consider, in each case that comes before the Courts, whether the facts bring the case within the operation of the Regulation.

The taluqs in which the lands in question are said to have been included were, no doubt, settled at the decennial settlement, and that settlement was in due course made permanent. But as might be expected after so great a lapse of time, little now survives of the original official papers, and what does survive is not very easy to construe.

The most important of the early documents are certain Mouzawari papers from 1801-02 onwards. These show clearly that, in assessing the taluqs, the *jhum* assets were taken into account. But this, as has been shown, is a neutral fact consistent with the case of either party. Beyond this it is difficult to carry the effect of those papers.

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Those papers were examined in detail by Counsel upon both sides on the argument of the appeal. It appears to their Lordships unnecessary to repeat that examination. It is enough to say that there are circumstances favourable to one side and circumstances favourable to the other, but that no confident conclusion could be drawn from these papers either one way or the other.

Reliance was also placed upon certain thakbast maps, but these are equally inconclusive.

The only other matter which remains to be considered is the evidence as to possession and enjoyment of the lands in question on the part of the plaintiff and those who preceded him. In the Courts in India the plaintiff sought to establish a title by adverse possession for sixty years. In this he was held to have failed, and on the argument of the appeal no such case was contended for, but the evidence of possession and enjoyment was relied upon as proof of title.

Regarded in this light, that evidence is important and it all points one way. It was shown that from as early as 1837 the appellants' predecessors in title received kabuliyats from persons carrying on *jhum* cultivation on the lands in question.

In 1842 and 1843 those predecessors in title succeeded in defeating an attempt to exercise rights over these lands on the part of the persons interested in an adjoining Mouza.

On several occasions in subsequent years the appellants' predecessors successfully resisted proposals on the part of Revenue Officers of Government to settle portions of these hill lands as ilam lands open for settlement. The most important instance was one that terminated in an order passed by the Board of Revenue (the highest Revenue Authority in the Province) dated the 14th September 1855. It had been proposed to offer for settlement a portion of the lands now in suit as ilam lands. This was objected to by the appellants' predecessors. The Collector overruled the objection but the Board of Revenue, concurring with the Commissioner, reversed that finding, and on the ground, as their Lordships understand it, that the lands were included in the Permanent Settlement. After that the possession and enjoyment of the appellants and those through whom they claim seem to have been continuous.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decrees of the Courts in India should be set aside, with the costs, and a decree made granting

the appellants the declaration asked for by the plaint. The respondent, the Secretary of State, will pay the costs of this Appeal.

Messrs T. L. Wilson & Co.,—Solicitors for the Appellants.

Solicitor, India Office,—Solicitor for the Secretary of State for India in Council.

J. M. P.

Appeal allowed.

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PRESENT : Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble, and Sir Arthur Wilson.

KALKA PARSHAD AND OTHERS

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and
July, 27.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Estoppel—Abandonment of point in the lower appellate Court—Formal admission, impossibility of—Examination of all the surrounding circumstances—Evidence—Admissibility—Pedigrees—Family records.

Where the judgment of the Appellate Court contained a statement that a particular point had been abandoned, which statement was challenged, the Judicial Committee considered the surrounding circumstances and held that he point had not been abandoned.

In support of a claim based on an alleged right of inheritance, three pedigrees were produced.

Held—(1) that one of these pedigrees which had been drawn up *post litem motam*, was inadmissible in evidence; (2) that another pedigree was admissible as a declaration made by a deceased member of the family touching the family reputation or tradition on the subject of its descent; to make this pedigree inadmissible, it was not sufficient to show that when it was drawn up, there was some dispute between the parties; it was necessary to prove that the matter now in controversy, after the statement, was in controversy then, before the statement and (3) that the third pedigree was admissible, for though not proved by the maker, it had been adopted by a member of the family, and was not made *post litem motam*.

Freeman v. Phillips (1), *Shrewsbury Peerage* (2) and *Duke of Devonshire v. Gill* (3) followed.

Appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh (April 17, 1906) reversing a decree of the Court of the Subordinate Judge of Unao December 16, 1903) (4).

(1) (1816) 4 M. & S. 486, 494, 497. (2) (1857) 7 H. L. C. 1, 22.

(3) (1876-1877) L. R. 2, Ir. 132.

(4) *Mathura Parshad v. Kalka Parshad*, 9 Oudh Cases 239.

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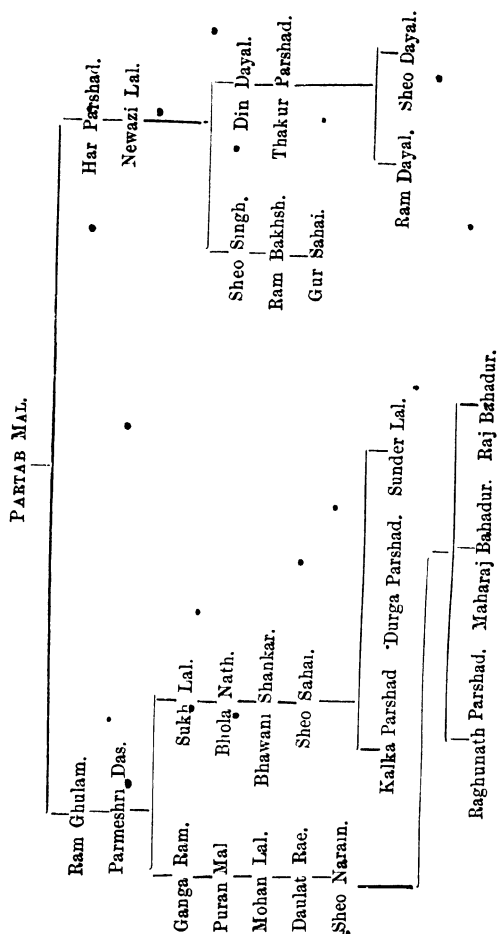
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The property (which was immovable) in suit belonged to one Gur Sahai, who died about 1867; Gur Sahai was succeeded by his widow Musammat Parbati; who died on March 22, 1896. After her death the first Respondent Mathura Parshad, who was the son of the sister of Gur Sahai took possession of the property, and succeeded in obtaining mutation of names in his favour in the Revenue Court.

On May 20, 1901, the appellants, Kalka Parshad, Durga Parshad and Sunder Lal, instituted the present suit in the Court of the Subordinate Judge of Hardoi to recover possession of the estate of Gur Sahai. The original defendants were the first respondent Mathura Parshad (defendant No. 1), the second respondent Khan Bahadur Chaudhri Muhammad Nasarat Ali (defendant No. 2, to whom, it was alleged, that the bulk of the property in suit had been illegally transferred), and defendants Nos. 3 to 7, to whom, it was also alleged, that portions of the property had been illegally transferred. With the latter the appeal had no concern. They did not attempt to defend the validity of the alienations made to them, a decree was made by the Subordinate Judge against them, and against that decree they did not appeal. The plaintiff alleged (*inter alia*) that after the death of Musammat Parbati, their father, one Sheo Sahai, who died on September 22, 1899, was the nearest surviving heir of Gur Sahai, the last male owner of the property, and as such, entitled to obtain possession thereof from the defendants. The following pedigree* was filed by the appellants to show their alleged relationship.

A written statement in defence was filed by Mathura Parshad, and Chaudhri Nasarat Ali filed a separate written statement. The defences were (*inter alia*) that Sheo Sahai was not the next reversioner, and that other persons claimed title as reversioners who were necessary parties to the suit. Mathura Parshad filed a pedigree, which showed that Gur Sahai was not descended from Partab Mal, son of Chajmal Das, but from another son of Chajmal Das, a younger brother of Partab Mal, named Shiam Das; that Gur Sahai stood in the 15th degree from the common ancestor, Chajmal Das, and Sheo Sahai in the 16th degree; and that the third respondent Sita Ram, the fourth respondent Manohar Lal, the fifth respondent Ram Sahai, and the sixth respondent Gur Parshad, who survived Musammat Parbati, were related to Gur Sahai in the same degree as Sheo Sahai. In consequence of the last mentioned plea eleven persons were added as defendants,

* See next page.



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who alleged that they in varying shares were jointly entitled with Sheo Sahai as heirs of Gur Sahai. Of those eleven persons, only four whose names are mentioned above, were respondents to the appeal. Thus there were three appellants and six respondents to the appeal.

Of the eleven issues framed by the Subordinate Judge, it is necessary to mention here only the following :—

2. Is the genealogical table filed by plaintiffs correct ?
3. If so, is Sheo Sahai the nearest heir to Gur Sahai under the Hindu Shastra ?

After the evidence both oral and documentary was recorded

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by the Subordinate Judge of Hardoi, who admitted, among others, the three pedigrees discussed in the judgment of their Lordships, the case was transferred to the Court of the Subordinate Judge of Unao, who delivered his judgment on December 16, 1903. He found that the appellants had proved the pedigree filed by them; that at the death of Musammat Parbati, there was no heir living who was nearer to her husband, Gur Sahai, than Sheo Sahai, the father of the appellants; and that as against the latter, the first respondent had no right to the property, and the transfers made by him were clearly invalid. Accordingly he decreed the claim of the appellants with costs.

Against that decree the first and second respondents filed one appeal, and the third respondent filed another appeal in the Court of the Judicial Commissioner of Oudh. The two appeals were disposed of by one judgment delivered on September 18, 1905, by two learned Judges. They examined in detail the documentary evidence of the appellants, upon which the Subordinate Judge relied, and decided that the greater portion, including the three pedigrees discussed in their Lordships' judgment, was not admissible in evidence. With regard to the oral evidence of the appellants to prove the pedigree filed by them, the learned judges, held that it was of as little value as the documentary evidence, and remarked that, at the hearing of the appeal, practically no attempt was made to support the finding of the Subordinate Judge. They were of opinion that the pedigree put forward by the appellants was not proved, but that on the pedigree admitted by Mathura Parshad, the appellants were entitled to succeed to a one-fifth share in the property in suit, the remaining four-fifths vesting in Sita Ram, Ram Sahai, Manohar Lal, and Gur Pershad. Decrees were accordingly made modifying the decree of the Subordinate Judge, and awarding to the appellants a one-fifth share in the estate of Gur Sahai.

On December 16, 1905, the first and second respondents applied to the Court of the Judicial Commissioner for review of its judgment dated September 18, 1905 on the grounds, among others, mentioned in their Lordships' judgment. On April 17, 1906, that Court made an order which concluded that "Sheo Sahai, the plaintiffs' father, being sixteenth in descen. from the common ancestor, Chajmal Das, was not a *Samanodaka* of Gur Sahai, and was not entitled to succeed to his property. As according to the Mitakshara, the right to succeed depends on propinquity of relationship, and the person who is sixteenth

from the common ancestor can scarcely be said to be a relation at all, while the sister's son is a *Bandhu*, the defendant, Mathura Parshad, should be considered as nearer heir than Sheo Sahai." In consequence decrees were made reversing the decree of the Subordinate Judge and dismissing the suit.

Against the four decrees of the Court of the Judicial Commissioner, dated respectively September 18, 1905 (two) and April 17, 1906 (two), the appellants filed four separate applications for leave to appeal to His Majesty in Council, and obtained from the Court of the Judicial Commissioner of Oudh the usual certificate granting such leave in each case. The respondents (Nos. 3 to 6 inclusive) Sita Ram, Monohar Lal, Ram Sahai and Gur Parshad did not appear at the hearing of the appeal.

Mr De Gruyther, K. C., and *Mr. Kyffin*, for the Appellants, referred to the Indian Evidence Act (I of 1872), sections 11, 32 (5) and (6), and 50, and contended that the pedigrees were admissible under one or other of those sections and the Subordinate Judge was right in admitting them. Those pedigrees established the case of the appellants, and it was submitted that the decree of the Subordinate Judge should be restored. Reference was also made to *Debi Pershad Chowdhury v. Rani Radha Chowdhrani* (1). In any event, the appellants were at least entitled to the share awarded them by the decree of the Court of the Judicial Commissioner dated September 18, 1905. Reference was made to *Mayne on Hindu Law and Usage* (7th edition) pp. 103 and 679.

Mr. Ross, for the first and second Respondents, contended that the evidence showed that the dispute really arose in 1891, and in consequence the pedigrees and statements made since that time were not admissible. The Court of the Judicial Commissioner had rightly held that the appellants had failed to prove their case, and its decree dated April 17, 1906 should be affirmed. The plaintiffs were estopped from contending that they were the heirs of Gur Sahai, because they abandoned that part of their case before the lower appellate Court.

Mr. De Gruyther, K. C. in reply, contended that looking at all the circumstances of what took place before the lower appellate Court, it was impossible to infer that the plaintiffs abandoned their plea that they were the heirs of Gur Sahai,

The judgment of their Lordships was delivered by

Lord Atkinson.—The suit out of which this appeal arises

(1) (1904) L. R. 31 I. A. 160; I. L. R. 32 Calc. 84.

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was instituted by the appellants, who are the three sons of one Sheo Sahai, deceased, claiming through their father as heirs of one Gur Sahai, deceased, to recover possession of the immovable property in the plaint described, of which Gur Sahai died possessed about 40 years ago.

Gur Sahai was succeeded in the possession and enjoyment of the property by his widow, Musammat Parbati, who died on the 22nd March 1896. Sheo Sahai died on the 22nd September 1899.

The principal defendant, the respondent Mathura Pershad, is the nephew of Gur Sahai, his sister's son. He took possession of the property on the death of Musammat Parbati, still retains it, and succeeded in obtaining a mutation of names in his own favour.

Only two questions were discussed on the hearing of the appeal, and it is only necessary for its decision that their Lordships should deal with these. They are :

1. Is it open to the plaintiffs, owing to what took place at the first hearing before the Court of the Judicial Commissioner, to attempt to establish that they are, according to Hindu Law, the heirs of Gur Sahai ?

2. If it be open to them to do so, is the evidence, legally and properly admissible, given before the Subordinate Judge who tried the case in the first instance, sufficient to establish the fact of their alleged heirship ?

The course the proceedings took before the Court of the Judicial Commissioner is somewhat peculiar. The plaintiffs had, at the hearing, examined several witnesses and given in evidence several pedigrees which, in the opinion of the Subordinate Judge, proved that Gur Sahai and Sheo Sahai were descended from one common ancestor, Partab Mal, son of Chajmal Das, were only seven degrees removed from that ancestor, and that the plaintiffs were, through Sheo Sahai, heirs of Gur Sahai. Mathura Parshad filed a pedigree which showed that Gur Sahai was not descended from Partab Mal at all, but from another son of Chajmal Das, a younger brother of Partab Mal, named Shiam Das, that Gur Sahai stood in the 15th degree from the common ancestor, Chajmal Das, and Sheo Sahai in the 16th degree ; and he contended that, under the Hindu Law, heirships did not extend beyond the 14th degree, and that therefore he (Mathura Parshad), though only a sister's son, was to be preferred as heir to such remote relations.

No evidence whatever was given to prove the latter pedigree.

Indeed it was abandoned by the respondents on this appeal. Yet the Court of the Judicial Commissioner, finding that it showed that five other persons stood in the same degree of relationship to Chajmal Das as did Sheo Sahai, held that the Hindu law permitted them, notwithstanding this, to succeed as heirs to Gur Sahai, and gave a decree for possession of one-fifth (not one-sixth as it should have been) of the land, the recovery of which was sought, as the share of Sheo Sahai therein.

Thereupon the defendants Nos. 1 and 2 applied under section 623 of the Civil Procedure Code for a review of this judgment, setting forth amongst other things :—

1. That the Court had held that the pedigrees set up by the plaintiffs were not proved, and that they were therefore not exclusively entitled to the property in suit.

2. That the question whether persons in the 16th degree could be preferred to Mathura Parshad, the nephew, was not allowed by the Court to be fully argued.

On this application, the Court of the Judicial Commissioner decided that the Hindu Law forbade, what they had previously decided it permitted, namely, the succession of a person sixteenth in descent from a common ancestor, on the ground that he could scarcely be said to be a relation at all, and that therefore the nephew Mathura Parshad should be considered as nearer heir to Gur Sahai than Sheo Sahai. They accordingly dismissed the plaintiffs' suit with costs. It is to be observed, however, that the Court, in deciding on this application, made no reference to the first point which they had decided, *viz.*, that the pedigree set up by the plaintiffs was not proved.

In the first judgment of the Court, they state that the finding of the Subordinate Judge that both Gur Sahai and Sheo Sahai were seventh in descent from Partab Mal, had been challenged by the defendants' advocate, who contended that the plaintiffs had failed to prove the pedigree on which they relied, and that all the documentary evidence on which the lower Court based its finding was inadmissible. They then proceeded to devote four pages of their judgment to a minute and critical examination of the evidence, written and oral, adduced by the plaintiffs, giving their reasons for holding that the documents were inadmissible, and the witnesses unworthy of belief, and they wind up this examination with the passage on which the respondents rely as sufficient to shut out the plaintiffs from

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attempting to sustain the decision of the Subordinate Judge. It runs as follows :

"The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the appellant, Mathura Parshad, the plaintiffs are heirs of Gur Sahai, as according to it they are *Samanodakas*, and therefore, in the absence of other nearer heirs, exclude the defendant, who is the son of Gur Sahai's sisters."

It is inconceivable why the evidence given before the Subordinate Judge should be thus elaborately reviewed, if the plaintiffs' advocate had formally admitted, he could not support that Judge's finding. It is almost as strange that this advocate should confine himself to a contention based on a pedigree proved by nobody, and binding on nobody but the person who filed it, and which, at the best, could only secure to his clients one-sixth of what they sought to recover. It is not less peculiar that the contention which is stated to have been the only contention put forward by the plaintiffs, is the very contention which was conducted in such a fashion that a review was successfully applied for. Having regard to these several matters, it appears to their Lordships impossible to hold that the plaintiffs are by the statement contained in this paragraph estopped from endeavouring to sustain, on this appeal, the finding of the Subordinate Judge on this point. The second question, therefore, alone remains for decision.

The plaintiffs gave in evidence at the trial three pedigrees, amongst others, namely (1) a pedigree purporting to have been written by one Maharaj Bahadur in 1872 ; (2) a pedigree purporting to have been filed by Sheo Sahai in 1892 or 1894 in a civil suit concerning lauds other than and different from the lands sued for in this action, in which Sheo Sahai was plaintiff and Kesho and others defendants ; (3) a pedigree filed in a suit brought for the recovery of the possession of certain lands in which Shankar Sahai (the son of the second defendant) was plaintiff, and Fazal Husain and others were defendants. The Subordinate Judge, though he held—quite rightly, in their Lordships' opinion—that the controversy out of which this appeal has arisen is but a stage in the dispute which arose on the death of Musammat Parbati in 1896, admitted each of these

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pedigrees in evidence, and the plaintiffs relied strongly upon them. They are not ancient family records, handed down from generation to generation, and added to, as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew them up or adopted them. Taking them in the reverse order, the last is inadmissible, having been made *post litem motam*. The second is endorsed. "(Signed) Sheo Sahai, Plaintiff, by the pen of Sunder Lal, Special Agent," and is on the evidence of Sunder Lal clearly admissible as a declaration made by a deceased member of a family touching the family reputation or tradition on the subject of its descent. It was held by the Court of the Judicial Commissioner not to be admissible on the same ground as the third pedigree because, in a statement made by Musammât Parbati in the absence of Sunder Lal, in a suit instituted by him against her in the year 1891 for cutting down trees in a certain grove in the village of Rampur Ansu, which he alleged was a halting-place, she had said :—"I have no kinship with him, nor am I on visiting and dining terms with him as a fellow-caste-man. He has no concern with my proprietary interest (*hakkial*). . . . The Plaintiff's [Sunder Lal's] father, and his co-sharers have wasted their shares in the *hakkial*." But it is clear that the controversy to which this statement refers was not a controversy as to the heirship to Gur Sahai, but referred to an entirely different matter. In order to make the statement inadmissible on this ground, the same thing must be in controversy before and after the statement is made—*Freeman v. Phillips* (1), *Shrewsbury Peerage* (2) and *Duke of Devonshire v. Neill* (3). In their Lordships' opinion, having regard to the evidence of Sunder Lal and of the other witnesses examined for the plaintiffs, this pedigree was clearly admissible.

The first pedigree purports to be signed by Maharaj Bahadur, a son of Sheo Narain, a deceased member of the plaintiffs' family, who was however not examined as a witness. According to the evidence of Kalka Parshad, it was in the handwriting of the former and was obtained by him from Sheo Narain in the years 1894-1896 (the precise date is not fixed) as a statement of the family descent, for the purpose of being given in evidence in certain criminal proceedings instituted under section 323 of the

(1) (1816) 4 M. & S. 486, 494, 497.

(2) (1857) 7 H. L. C. 1, 22.

(3) (1876-77) L. R. 2 Ir. 132.

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Indian Penal Code in the case of *In re Baiju and others v. Sundar Lal and Durga Parshad*. It was thus adopted by Sheo Narain, is not shown to have been made *post litem motam*, and is therefore, in their Lordships' opinion, admissible.

These pedigrees disclose that Gur Sahai and Sheo Sahai are descended from a common ancestor, Partab Mal, one of the sons of Chajmal Das, the first through his son Har Parshad, the second through his son Ram Ghulam, each being six, degrees removed from Partab Mal. Six of the many witnesses examined on behalf of the plaintiffs, members of the family, prove descent from this common ancestor. Three of these, namely, Kalka Parshad, Mohabbat Rai, and Sunder Lal, prove pedigrees, substantially identical with that signed by Sheo Sahai filed in 1892 or 1894, and others, such as Hazari Lal, prove important portions of it; while Lalta Parshad, one of the defendants' witnesses, deposed as follows :—

"Sheo Sahai also belongs to the family of Gur Sahai. I have heard that he is also remote by six degrees. In my opinion, both [*i.e.*, Madho Ram and Sheo Sahai] are equally related, *i.e.*, in the same degree."

And Sri Kishen, another witness for the defendants, a priest of the family of Sita Ram deposed :—

"Sheo Sahai and Sheo Narain descend from Ram Ghulam, Gur Sahai descends from Har Parshad; Ram Ghulam, Har Parshad, and Shiam Das are sons of Partab Mal."

This evidence precisely accords with the above-mentioned pedigrees numbered 1 and 2, proves, in fact, some of the most important steps in them, and is, therefore, the strongest corroboration of them.

Further corroboration of these pedigrees is to be found in the mode in which a certain Mohalla Sarai has been enjoyed. The family reputation is that this Sarai was founded by Sundar Das (one of the brothers of Partab Mal), who died childless. If the pedigrees of 1872 and 1894 be correct, then half, or an 8-annas share in this Sarai, should be found in the enjoyment of the descendants of Partab Mal, and the remaining 8-annas share in the enjoyment of the descendants of Shiam Das, the only brother of Partab Mal who had descendants. That, according to the evidence of Raghunath Parshad and Kalka Parshad, is precisely what is found. Two-annas shares were enjoyed by Sheo Sahai, Sheo Narain, and Gur Sahai respectively; a 2-annas share by Sheo Dyal and Ram Dyal (who died childless) jointly,

and the remaining 8 anna by Sita Ram, Gur Parshad, Ram Narain, Shankar Sahai, and other descendants of Shiam Das. The Subordinate Judge points out that had Sheo Sahai and Sheo Narain been descended, as was contended for by the defendants, from Shiam Das and not from Partab Mal, the whole 8 anna share of Partab Mal must, in the events which have happened, have come to Musammat Parbati. Sita Ram, one of the defendants, gives in detail the distribution of an eight anna share in the Sarai coming into the hands of his branch of the family, and states that the Sarai is joint property. No evidence is given to contradict that of Raghunath Parshad and Kalka Parshad as to the persons amongst whom the share of Partab Mal in the Sarai is distributed.

It was argued by Mr. Ross, on behalf of the defendants, that the fair conclusion to be drawn from the evidence was that Maharaj Bahadur was either not born in 1872, or was then of such tender years that he could not have drawn up the first pedigree, as deposed to by Kalka Parshad. No doubt there is much force in this argument, but even if it prevailed, there remains the second pedigree, that of 1892, corroborated as it has been in the manner pointed out.

Their Lordships think that it is impossible to put aside all this evidence, as was done by the Court of the Judicial Commissioner. They are, therefore, of opinion that the conclusion at which the Subordinate Judge arrived is that to which the evidence properly admissible, on the whole, most reasonably leads, and that the decision of the former tribunal was erroneous and that its decrees should therefore be reversed with costs, and this appeal allowed. They will humbly advise His Majesty accordingly. The respondents must pay the costs of the appeal.

Messrs. Young, Jackson, Beard & King, Solicitors for the Appellants.

Messrs. T. L. Wilson & Co., Solicitors for the first and second Respondents.

Respondents Nos. 3 to 6 inclusive did not appear.

J. M. P.

Appeal allowed.

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APPELLATE CIVIL.

Before Mr. Justice Casperz and Mr. Justice Coxe.

BEJOY GOPAL MUKERJI AND OTHERS

v.

GIRINDRA NATH MUKERJI AND OTHERS*

AND

SANKAR NATH MUKERJI AND OTHERS

v.

BEJOY GOPAL MUKERJI AND OTHERS*

AND

LOKE NATH SAHA CHOWDHURY AND OTHERS

v.

BEJOY GOPAL MUKERJI AND OTHERS.*

Widow, lease by—No legal necessity—Beneficial arrangement—Bargain not prejudicial to the reversioners—Legal necessity depending on facts of each case—Possession, suit for, by some of the reversioners, of their shares, maintainability of—Family Settlement, principle of, applicable to arrangement between parties interested in the property—Ratification—Indian Contract Act (IX of 1872) Secs. 196, 190.

A suit by some of the reversioners to recover possession of their shares from the lessee of a Hindu widow after her death is maintainable.

Each case of legal necessity must be judged upon its own facts.

The reversioners must establish a very strong case to induce a Court of justice, equity and good conscience to set aside a beneficial arrangement by a Hindu widow which induced a sense of peace and security and one that has had a far-reaching consequence.

If a Hindu widow made a good bargain for herself, and if that bargain did not prejudice the position of the then reversioners, it should be given effect to.

Dayamani Debi v. Srinibash Kundu (1) applied.

Venkaji Sridhar v. Vishnu (2) referred to.

If parties arrange to avoid the necessity for legal proceedings their arrangement is supported by sufficient consideration.

Apart from legal necessity a widow can validly alienate property that has devolved on her from her husband with the consent of the reversioners. The widow can make such an alienation by the entire surrender of her own interest and thereby accelerate the interest of the reversioners or she can, part with her direct interest in the estate and convert it into an annuity. Subject to the payment of the annuity, the transferee will acquire an absolute interest.

* Appeals from Original Decrees Nos. 71, 94 and 99 of 1899, against the decree of Babu Prosanna Coomar Ghosh, Subordinate Judge of Nadia, dated the 28th November 1898.

(1) (1900) I. L. R. 33 Calc. 842. (2) (1893) I. L. R. 18 Bom. 534.

Hem Chunder Sanyal v. Surnomoyi Debi (1) referred to; *Gobind v. Khunni* (2) distinguished.

The principle of family settlements is applicable to an arrangement by which the persons interested in the property mutually consent that the property shall be managed in a particular and a convenient manner and if the arrangement does not seriously prejudice the parties to it or those who come after them, a Court of equity will be slow to set it aside.

Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. A woman with a limited interest could not by acts *ex post facto* charge upon the estate which she represents, obligations not originally binding upon it. A Hindu widow cannot be said to give a lease on behalf of the reversioners. The acts performed by the reversioners after the death of the widow cannot amount to a ratification of the lease, as the widow is not the agent of the reversioners.

Raja Rai Bhagwat Doyal Singh v. Debi Dayal Sahu (3) followed.

Appeal by the Plaintiffs (in No. 71 of 1899) and by the Defendants (in Nos. 94 and 99 of 1899).

Suit to recover *khas* possession of a four-seventh share of certain properties.

The facts of the case and argument appear sufficiently from the judgment.

Dr. Rash Behary Ghose and Babus Ram Charan Mitter, Promolho Nath Sen and Matindra Nath Bhattacharjee for the Appellants (in appeals Nos. 94 and 99 of 1899) and for the Respondents (in appeal No. 71 of 1899).

Babus Baidya Nath Dutt, Dwarka Nath Chuckerbutty, Hara Prosad Chatterjee, Surendra Nath Ghosal and Biraj Mohun Mojumdar, Dr. Priya Nath Sen and Babu Ramani Mohun Chatterjee for the Respondents (in Appeals Nos. 94 and 99 of 1899) and for the Appellants (in appeal No. 71 of 1899).

C. A. V.

The judgments of the Court were as follows :

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The suit giving rise to this and the connected appeals was brought by four out of the seven reversionary heirs of one Chandra Bhusan Mookerjee who died in the year 1832. The plaintiffs sought to recover *khas* possession of a 4-7th share of certain properties, and, prayed for a declaration that an *ijara* dated the 23rd Bhadra 1270 (7th September 1863) granted for a term of sixty years by Sayamani Debi the widow of Chandra Bhusan Mukerji; and the *Dur-ijaras*, and *Se-ijaras* derivatively created thereunder had become inoperative since the death of Sayamani Debi. The plaintiffs allege that all these transactions are not binding on them.

(1) (1894) I. L. R. 22 Calc. 354 (361). (2) (1907) I. L. R. 29 All. 487 (494).
(3) (1907) 7 C. L. J. 335; I. L. R. 35 Calc. 420.

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The *ijara* was granted by Sayamani Debi to Annada Proshad Mookerjee the father of the plaintiffs, and to Sarada Pershad Mookerjee, the son of the brother (Gouri Pershad) of Annada Pershad. The geneological tree (at page 10 of the paper book in appeal No. 71 of 1899) is not disputed. The history of the litigation between the members of the family goes back to the year 1814 when Chandra Bhusan Mookerjee's paternal grandfather Mohadeb Mookerjee made a partition of the zemindari and gave a 4 anna share to the father of Chandra Bhusan Mookerjee. Baman Das Mookerjee (the father's brother's son of Chandra Bhusan) appropriated this share under cover of a deed of trust dated the 7th Aswin 1239 (1832) bearing the signature of Chandra Bhusan Mookerjee. The deed of trust purported to show that Chandra Bhusan Mookerjee had adopted Mathura Nath Mookerjee the third son of Bamandas Mookerjee.

In the year 1844, twelve years after the death of Chandra Bhusan Mookerjee, his widow Sayamani Debi instituted suit No. 39 of 1844 against Baman Das Mookerjee and obtained a decree for her share of the inheritance. The final decision in that litigation is reported [*Bamandoss Mukerjia and Mussamut Raj Lukhee v. Mussamut Tarinee* (1)]. It bears dates the 22nd and 23rd February 1858.

The defendants Nos. 9 to 13, the appellants in the present appeal, who are some of the representatives of Bamandas Mookerjee, support the *ijara* granted by Sayamani Debi against the plaintiffs. Their case is that Sayamani Debi, harassed and exhausted by the protracted litigation, and unable to get complete and effective possession of the properties decreed to her, with the exception of three smaller properties, entered into an arrangement with the then reversioners (Annada and Saroda) and granted them an *ijara* of all the properties for a term of sixty years in order to secure a competence for the rest of her life, leaving the lessees to continue the contest with Bamandas Mookerjee the remaining reversioner, and that, for this purpose *ekrarnamahs* were executed between the parties simultaneously with the *ijara* of the 7th September 1863. It is conceded that numerous *Dur-ijaras* and *Se-ijaras* were created after the original *ijara* during the interval up to the death of the widow which occurred thirty years later, in the year 1893.

The Subordinate Judge found that the suit was not barred by limitation and gave the plaintiffs a decree for all the properties

with the exception of certain properties, in the Mymensing and Faridpur Districts, the claim to which, in the opinion of the court below, could not prevail because the plaintiffs had ratified the *ijara* in respect of these properties after the death of the widow. In this court (Sir Francis Maclean, Chief Justice and Geidt, J.) the decision of the Subordinate Judge was reversed on the question of limitation, and it was held that the suit was barred. The matter then went up to His Majesty in Council, and their Lordships of the Judicial Committee remanded the cases for a consideration on the merits. The Judgment of the Privy Council is reported in *Bejoy Gopal Mukerji v. Krishno Mohishi Debi* (1).

In these circumstances, this and the connected appeals have been reargued before the present Bench, and the points arising for determination are *first*, whether Sayamani Debi executed the *ijara*, dated the 7th September 1863, for legal necessity, and whether, for any other reason, the *ijara* does or does not bind the present reversioners; *Secondly*, whether the doctrine of ratification bars the suit; and, *thirdly*, whether the suit is defective because the plaintiffs seek to recover not the whole property but only a 4-7th share of the same.

The third contention may be dismissed in a few words. The plaintiffs did not sue to set aside the *ijara* but to recover possession of their share of the immovable properties in dispute, and, in accordance with the view adopted by the Judicial Committee on the question of limitation, the suit cannot be defeated because the plaintiffs did not sue to recover the entire property of Chandra Bhusan Mookerjee.

The facts do not appear to be seriously disputed, and the learned Counsel and the learned Vakeels representing the different parties in this and the other appeals have argued on the inferences to be drawn from the facts and on pure questions of law. Sayamani Debi brought her suit in 1844 not only against Baman Das Mookerjee but also against Annada Prosad Mookerjee, the father of the plaintiffs, and Gouri Pershad Mookerjee the father of Sarada Proshad Mookerjee, and she was assisted by her cousin Umesh Chunder Roy, otherwise known as Moti Babu, to whom she, on the 25th November 1851, gave an *ekrar* which is printed at page 227 of the paper book in appeal No. 71 of 1899. It was recited in that *ekrar* that the lady had become indebted to the extent of rupees 38,000 for which she had

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executed a mortgage bond in favour of Umesh Chunder Roy's brother Bhagaban Chunder Roy. She undertook to pay Rupees 50,000, including the previous Rupees 38,000, with interest at the rate of 12 per cent. per annum, when she had realised the costs and mesne profits due to her under the decree of the Sudder Court, and she gave security for that amount. This *ekrar* was entered into shortly after the decree of the Sudder Dewany Adawlut, in favour of Soyamoni Debi, passed on the 30th September 1850. The litigation continued until the decree of the Privy Council (in 1858) to which we have already referred.

There can be no doubt as to the *bona fides* of the claim advanced by Sayamani Debi and the fact can not be controverted that she had been involved in protracted litigation for the attainment of her just rights and the rights of her husband's reversioners.

After obtaining her decree from the Privy Council, Sayamani Debi recovered possession of the three properties mentioned in the *ijara* of the 7th September 1863 where it was recited that she was in possession of those properties by collecting rents. Reading the *ijara* we find that Sayamani Debi leased for a term of 60 years the whole of the talooks, Indigo factories, gardens, tanks, &c., described in the Schedule, possession of which had not been taken, together with the three properties possession of which had been recovered. The lessees undertook to pay Sayamani a balance of Rupees 5,300 annually after paying the Government revenue amounting to Rupees 7,030 odd. They, also, undertook to assist Sayamani in duly executing the decree of the Privy Council and she covenanted that she would do so. The arrangements were embodied in the *ijara* lease and the *ekrarnamahs* Exhibits A and A2 all of the same date. At that time the lessees Annada Proshad Mookerjee and Sarada Pershad Mookerjee were disputing with Bamandas Mookerjee. But they adjusted their differences in the year 1866 when Bamandas Mookerjee took a *darijara* of the 1/3 interest in the *ijara* of the 7th September 1863. This *darijara* was in the name of Bamandas Mookerjee's son, but there can be no question that Bamandas was the person beneficially interested. The defendants Nos. 9 to 13, the appellants in the present appeal, derive their title, as we have already stated, from Bamandas Mookerjee.

The plaintiffs did not bring the suit in their capacity of sons of Annada Proshad—one of the original *ijaradars*—but as the

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reversionary heirs of the husband of Sayamani Debi who granted the *ijara*. But, in considering the circumstances in which that *ijara* was granted, we cannot shut our eyes to the fact that the plaintiffs are standing upon a technical legal right and not upon any equities affecting the welfare of the descendants of Mohadeb Mookerjee who effected the partition in the year 1814.

We have already observed that the Subordinate Judge decreed the suit for all the properties with the exception of certain properties lying within the Districts of Mymensingh and Faridpur, the claim to which, in his opinion, could not prevail, because the plaintiffs had ratified the *ijara* in respect of those properties after Sayamani's death in 1893. On the question of legal necessity the Subordinate Judge held that the *ijara* was at most a beneficial arrangement not amounting to legal necessity in the sense in which that expression is used in Hindu Law. It will be convenient to consider this question first.

The doctrine of legal necessity has been elaborated in a series of judicial decisions. Each case must be judged upon its own facts. There can be no doubt that when Sayamani entered into the arrangement with Annada Proshad Mookerjee and Sarada Proshad Mookerjee her fortunes were at a very low ebb. She was in debt and her cousin Moti Babu and her gomasta had been convicted by a Criminal Court in connection with some cases arising out of an attempt to execute decrees for rent in the property of which she had obtained nominal possession. The *ijara* arrangement turned out to be eminently successful because her principal opponent Bamandas Mookerjee took a *darijara* in the year 1866, and the numerous parties who have been impleaded in the present litigation, or rather such of them as were then alive, regarded the *ijara* as a sound and honest disposition of her property by Sayamani Debi. It can be said that, as the term of 60 years was evidently beyond the then expectation of life of Annada Pershad and Saroda Pershad, it may be reasonably inferred that they considered it a beneficial arrangement not only for themselves but for their descendants. A sense of peace and security was induced. For 30 years, until the death of the widow in 1893, derivative titles were created and acted upon. The plaintiffs must establish a very strong case indeed to induce a Court of justice, equity and good conscience to set aside a beneficial arrangement of this kind and one that has had such far-reaching consequences.

For the plaintiffs it has been argued that Sayamani Debi was

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coerced by *cruel* necessity into granting the *ijara* and that she might very well, if she had been desirous of parting with her life estate, have granted it for the terms of her natural life and not for 60 years. We, however, think that the very fact that the term actually adopted was 60 years, and not the uncertain space of human life, is a very strong indication that all the parties interested sought to make a definite arrangement possessing the best elements of finality and, if we find that the arrangement was for the benefit of the estate, and did actually benefit the estate, we should apply and even broaden the principle adopted in the case of *Doyamoni Debi v. Srinibash Kundu*. (1) There it was said that a Hindu widow, as regards her management of the estate, has not less power than the manager of an infant's estate and that the reversioners were not entitled to set aside permanent leases granted by her which were found to be beneficial to the estate and by which they were found to have been benefitted. The principle is based upon decisions of their Lordships of the Judicial Committee and it was applied in *Venkaji Shridhar v. Vishnu Babaji Beri*, (2) where Sir C. Sargent C.J., said "A widow like a manager of the family must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to her expectant heirs." *A fortiori* if Sayamoni Debi made a good bargain for herself, and if that bargain did not prejudice the position of the then reversioners, it should be given effect to, and the present reversioners ought not to be allowed to obliterate the history of nearly half a century. No doubt the authorities to which we have been referred as showing that costs of litigation may amount to legal necessity are not precisely in point. It does not appear that the *ijara* was entered into merely to meet the costs incurred by Sayamoni Debi in the litigation. But the concurrent *ekrar-namahs* provided for the liquidation of all her debts and if the widow chose to become an annuitant and to make over her estate to the next taker some of whom accepted the arrangement then and there, and some of whom subsequently accepted it, there is no reason on principle or authority why such an arrangement should be set aside. We are disposed to give a broad meaning to the word 'arrangement.' It does not necessarily imply an agreement; see *Massung v. Eastern Counties Railway Company* (3); but here it proceeded on representations of facts, not of mere intentions. [*Narain Das v. Ramaunj Dayal* (4)]. In connection

(1) (1906) I. L. R. 38 Calc 842. (3) 12 M. & W. 237 (253).

(2) (1893) I. L. R. 18 Bom. 534. (4) (1897) I. L. R. 20 All 209 (P. C.)

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with the subject of subsequent assent we rely on *Bajrangi Singh v. Manokarnik Bakhsh Singh* (1) where their Lordships of the Judicial Committee observed that the consent of the reversioners was sufficient and that it was immaterial that it was given after the execution of the deed, then in question, and they applied the maxim *omnis ratihabitio retrotrahitur et mandato priori æqui paratur*. Transactions of this kind may become valid by the consent of all those who are likely to be interested in disputing them. *Raj Lukhee Dabee v. Gokool Chunder Chowdhry* (2). The circumstances of the present case warrant an application of the further principle that if parties arrange to avoid the necessity for legal proceedings their arrangement is supported by sufficient consideration. Apart from legal necessity a widow can validly alienate property that has devolved on her from her husband with the consent of the reversioners. The widow can make such an alienation by the entire surrender of her own interest and thereby accelerate the interest of the reversioners or she can, as in the present case, part with her direct interest in the estate and convert it into an annuity. Subject to the payment of the annuity the transferee would acquire an absolute interest; *Hem Chunder Sanyal vs. Sarnamoyi Debi* (3). Our attention has been called to the judgment of Sir John Stanley C.J., and Burdett, J., in *Gobind Krishna Narain v. Khunni Lal*, (4) where, quoting Mr. J. C. Ghose's book on Hindu Law, it was said "a decree against a widow to bind the reversioners must have been passed after full contest and a compromise decree, or a decree on an arbitration, can have no higher footing than an alienation by the widow." On the facts of that case the doctrine of family settlement of doubtful claims was not applied. The case of *Imrit Konwur v. Roop Narain Singh* (5) was a case of compromise by a widow as against her minor daughters. But the *ijara* of the 7th September 1863 was not a compromise. There was no settlement then effected of doubtful claims. Nevertheless, the principle of family settlements, in our opinion, is applicable to an arrangement by which the persons interested in the property mutually consent that the property shall be managed in a particular and convenient manner, and, if the arrangement does not seriously prejudice the parties to it or those who come after them, a court of equity will be slow to set it aside.

(1) (1907) 6 C. L. J. 766 (778) (P. C.) (3) (1894) I. L. R. 22 Calc. 354 (361.)
 (2) (1869) 13 M. I. A. 209 (228.) (4) (1907) I. L. R. 29 All. 487 (494.)
 (5) (1880) 6 C. L. J. 76 (81.)

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How, then, have the plaintiffs been prejudiced by the *ijara* of the 7th September 1863? We have been unable to find a satisfactory answer to this question. The test is how long has the arrangement been acted upon. In *Ramanathan Chetti v. Murugappa Chetti*, (1) Lord Macnaghten observed. "The unbroken usage for a period of 19 years is, as against the appellant, conclusive evidence of a family arrangement to which the court is bound to give effect. ... It was one which the court would, no doubt, have sanctioned, if its authority had been invoked." In *Helan Dasi v. Durga Das Mundal*, (2) the test of long usage was not necessary because other considerations were found to be sufficient; see *Williams v. Williams* (3) and *Stapilton v. Stabilton*, (4). Sayamani lived for 30 years after 1863; the suit of the plaintiffs was instituted on the 30th April 1897. This long period of rest was attributable to the measures taken by Sayamani. She had executed her decree and obtained possession of three properties; she had entered into negotiations for an adjustment of her claims, and had actually remitted Rs. 1,72,000 on account of mesne profits to Baman Dass Mookerji; she had received a sum of rupees 42,000 up to the 8th February 1861. Apart from legitimate and natural influences, no coercion had been exercised upon Sayamani. She was in a position of superior to Bamandas Mookerjee owing to the decree of the Privy Council. He actually begged her to show him some consideration. In a deposition given by Sayamani, on the 6th June 1889 (pages 1 to 9 of the paper book in appeal No. 94 of 1899) the lady, shortly before her death, said. "In the execution case Bamandas Babu alone was the judgment-debtor. Annoda Proshad and Gouri Proshad were not judgment-debtors, consequently what I remitted was remitted to Bamandas Babu alone. I made an *ijara* settlement with Annada Proshad and Saroda Proshad at the time of the family dispute amongst my husband's elder brothers. Being in difficulties on account of my debts, and as both the parties were particularly eager about it, I granted the said *ijara* settlement for a term of sixty years." Such was the impression left on the mind of the aged lady 26 years after the transaction, and we think that her impression should not be disregarded. A prudent management of the property of Chandra Bhusan Mookerjee was called for. It was situated in numerous districts; it had been

(1) (1906) L. R. 33 I. A. 139; 4 C. L. J. 189 (P. C.)

(2) (1906) 4 C. L. J. 323 (331.)

(3) (1867) L. R. 2 ch. App. 294.

(4) (1739) 1 W. and T. L. C. 7th ed 223.

out of possession for 26 years at least (1832-1858) and adverse rights must have grown up. The usual method of management in such cases is by granting sub-leases of convenient parcels of the estate. Then, the disputes arising in the course of execution proceedings had resulted in loss of collections. Any one conversant with the management of landed property in the mofussil must be well aware that disputes between co-sharers lead to a total cessation of rent collections. In our opinion, therefore, the end justified the means adopted by Sayamoni who, in securing that end, which was a prudent and effective management of the properties decreed to her, after a protracted litigation, acted within her powers, and the fact that her principal opponent took a *darijara*, and accepted the situation in the year 1866, conclusively shows that the *ijara* arrangement was made for the benefit of the estate and did not prejudice any one.

We have referred to the growth of adverse rights during 1832-1858. It appears that, under the law prevailing before the present Limitation Act came into operation, adverse possession against a widow was held to be adverse possession against the reversioners. The estate of Sayamani was, therefore, in danger of being lost unless the parties opposing her came to terms and took the management into their own hands.

For these reasons, we think the plaintiffs should not be allowed to take possession of the properties in suit until the expiry of the *ijara* term of sixty years.

The next contention raises the question of ratification of the *ijara* by the plaintiffs after the death of Sayamoni in 1893.

Section 196 of the Contract Act provides that where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority. Section 199 embodies the general rule that where a ratification is established as to a part, it operates as a confirmation of the entire transaction. In *Raja Rai Bhagawat Dayal Singh v. Dibi Dayal Sahu* (1) the Privy Council pointed out that ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. Their Lordships observed, "It would be a serious extension of law, as hitherto applied, to hold that a woman with a limited interest could, by acts *ex post facto*, charge upon the estate which she represents,

(1) (1907) 7 C. L. J. 335 (356).

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obligations not originally binding upon it." It cannot be said that Sayamani gave the *ijara* in 1863 on behalf of the reversioners who would become entitled to the estate of her husband at her death in 1893. The acts performed by the reversioners after 1893 cannot, therefore, amount to a ratification of the *ijara*, in the strict sense of the term. Sayamani was never the agent of the plaintiffs.

But the defendants really rely on the doctrine of election and the case of *Modhu Sudan Singh v. E. G. Rooke* (1). There the reversioners had elected to treat as valid a putni lease granted by the widow; he had accepted rent in respect of the tenure after the death of the widow.

The question, then, resolves itself into this: Did the plaintiffs elect to affirm the validity of the voidable *ijara* lease of the 7th September 1863? The question does not arise if Sayamani granted the *ijara* lease for legal necessity or for any other sufficient reason as we have found she did.

In our opinion, the evidence does not amount to proof of an election by the plaintiffs. As regards the payment of Government Revenue and cesses by the *ijaradars*, the use of the words *borat* (on behalf of) can not in itself saddle the plaintiffs with the responsibility of acquiescence in the *ijara*. The *ijaradars* were bound to pay the revenue and cesses without reference to their lessors. That they continued to do so is cogent evidence that the arrangement made in 1863 was adhered to or, at any rate, that it was not repudiated by the plaintiffs until they failed to get advantageous terms from the *ijaradars* and the persons holding by sub-infeudation; secondly, as regards the receipt of *ijara* rents, we do not find that the plaintiffs ever received such rents. The plaintiffs' brother Upendra Lal Mookerjee (defendant) did not collect rent dues on account of Sayamani's share and the Shaha defendants had no *ijara* or *seijara* under the plaintiffs (see the evidence at pp. 142-3 of the paper book in appeal No. 71 of 1899.) The postcard Ex. A26 relied on by the Subordinate Judge proves nothing and the Acharjya defendants who made some payment or other have entered into a compromise with the plaintiffs. The other piece of evidence commented on in the judgment of the Court below refers to a *darijara* granted to one Moijuddin by plaintiffs' brother the defendant Upendra Lal Mookerjee and we accept the explanation of plaintiff Bijoy Gopal on this point. There is no proof of any clear and unequivocal

(1) (1897) 1. L. R. 25 Cal. 1.

election by the plaintiffs, and Moijuddin's lease came to an end in 1894 after which he obtained a fresh settlement from the plaintiffs.

For all these reasons we disallow the second contention on behalf of the defendants appellants and we find that plaintiffs did not ratify or elect to affirm the *ijara* of 1863 after the death of Sayamoni Debi.

The appeal succeeds on the first contention only and plaintiffs' suit must be dismissed with costs payable to the defendants Nos. 9-13.

APPEAL NO. 99.

The judgment we have just delivered in appeal No. 94 of 1899 will govern this appeal also. The appellants are the shahs, Defendants Nos. 36-44; they represent two *darijaras* and one *se-ijara* (p.p. 64, 79 of the paper book in this appeal).

The contentions on behalf of the shaha defendants are the same as those in appeal No. 74, but they lay particular stress on the doctrine of election.

For the reasons already given we allow this appeal on the first contention, namely, that the *ijara* of 1863 is valid and not voidable. The plaintiffs must pay the costs of these defendants.

APPEAL NO. 71.

The judgment we have just delivered in Appeal No. 94 of 1899 will govern this appeal also. The appellants are the plaintiffs. They have entered into a compromise with defendants Nos. 49-61 in this appeal and we have sanctioned the same on behalf of the minor defendants. Defendants 47 and 48 do not appear.

We have found in favour of the plaintiffs on the question of ratification or election.

Even if the plaintiffs had succeeded in their main contention they would not be entitled to mesne profits before suit. Their conduct and the circumstances of this litigation disentitle them to such mesne profits.

The remaining contention is special to this appeal. It is covered by the 11th and 12th issues dealt with in the Court below. The plaintiffs seek to set aside certain putni leases granted by Baman Das and Sambhu Nath long before the *ijara* of 1863. We entirely agree with the Subordinate Judge in his reason on this point. But as it appears that some of the

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defendants (18-24) compromised the matter with the plaintiffs on the 2nd June 1903 and that the decrees of the High Court and Privy Council are not affected thereby the compromise in question will hold good as between the parties to it.

Appeal No. 71 of 1899 being in the nature of a cross appeal, and appeals Nos. 94 and 99 being successful, this appeal stands dismissed. We make no separate order for costs of this appeal.

A. T. M.

*Appeals Nos 94 and 99 allowed.**Appeal No 71 dismissed.**Before Mr. Justice Mookerjee.*

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v.

HARA GOBINDA KALAL AND OTHERS*

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November, 13, 14, 21.

Limitation Act (XV of 1877) Sch. II, Arts. 14, 121—Noabad taluk, incident of.

Article 14 of Schedule II of the Limitation Act refers to orders and proceedings of a functionary to which by law is given a particular effect in favour of one person or against another, subject, in the regular course, to a further judicial proceeding having for its object to quash them or set them aside.

Shivaji v. Collector of Ratnagiri (1) followed.

The article has no application where an order is null and void and does not affect the plaintiff's interest, so that there is no occasion to set it aside.

Dejoy Chand v. Kristo Mohini (2) *Moti Lal v. Karrabuldeen* (3) and *Roghunath v. Kanuz* (4) referred to.

Where subsequent to the purchase of an entire Noabad mahal at a sale for arrears of revenue by the plaintiff, the term of the taluk expired and Government resettled the taluk in favour of the defaulting proprietors and the plaintiff instituted a suit for recovery of possession of a parcel of land included in the taluk purchased.

Held.—That the rule of limitation applicable was that embodied in Article 121 and not in Article 14 of Schedule II to the Limitation Act.

A Noabad taluk is not necessarily temporarily settled; it may be a permanently settled one. The re-settlement of a Noabad taluk does not necessarily mean a settlement with new talukdars; it may be an adjustment of the revenue and nothing more.

Prosunno Coomar v. Secretary of State (5) referred to

* Appeals from Appellate Decrees Nos. 2080, 2081, 2096 and 2162 of 1903 against the decrees of Babu Govinda Chandra Das, Officiating Subordinate Judge of Chittagong dated the 6th August 1903, affirming those of Babu Charu Chandra Mitra, Munsiff of Chittagong dated the 26th December 1902.

(1) (1886) I. L. R. 11 Bom. 429. (3) (1897) I. L. R. 25 Calc. 179 P. C.

(2) (1894) I. L. R. 21 Calc. 626 (4) (1902) I. L. R. 24 All. 467.

(5) (1899) I. L. R. 26 Calc. 792.

Appeal by the Plaintiff.

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The facts of the case and argument appear sufficiently from the judgment.

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Babu Lal Mohan Doss and Moulvi Serajul Islam for the Appellant.

Babu Dhirendralal Kastgir for the Respondent.

C. A. V.

The judgment of the Court was as follows :

Mookerjee J.—On the 18th October, 1889, the plaintiff appellant purchased an entire Noabad mehal at a sale for arrears of revenue. On the 7th October, 1901, he commenced the action out of which the present appeal arises for recovery of possession of a parcel of land included in the taluk purchased by him. The first defendant is a tenant under the second and third defendant who were the defaulting proprietors. The fourth defendant is a benamdar of the plaintiff and the fifth defendant is his brother, and as no relief has been claimed against them, no further reference need be made to them. The contesting defendants resisted the claim substantially on three grounds, namely, *first*, that the suit is barred by limitation, as the plaintiff was not in possession within the statutory period; *secondly*, that the defaulting proprietors held an undertenure which was in the nature of a protected interest, and was not affected by the revenue sale; and *thirdly*, that subsequent to the purchase by the plaintiff, the term of the taluk had expired, and Government had created a new taluk in favour of the defaulting proprietors, defendants 2 and 3. The Court of first instance tried only the question of limitation and held that the suit was barred under Art. 14, schedule II of the Limitation Act. In this view of the matter, the Munsiff did not deal with the other questions, and dismissed the suit. Upon appeal, the Subordinate Judge affirmed the view that the suit was barred under Art. 14, and went on to add the following observations with regard to the third issue which raised the question, whether the plaintiff had any subsisting title: "With regard to the third issue, it may be observed, that as the Government appears to have made a new settlement with the defendants 4 and 5, with effect from 1895 or 1896, the old taluk which the plaintiff appears to have purchased in revenue sale is now a nonentity and a new state of thing has now come into existence". It is said by the

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learned Vakil for the respondents that the Subordinate Judge meant to find that the settlement had been made with defendants 2 and 3. Be that as it may, the Subordinate Judge dismissed the appeal preferred to him. The plaintiff has appealed to this Court, and two points have been urged on his behalf, namely, *first*, that the suit is not barred by limitation, and *secondly*, that the question whether the plaintiff has a subsisting title has not been properly tried.

In support of the first point, it has been contended, that the rule of limitation applicable is that embodied in Art. 121 of schedul II to the Limitation Act which provides that a suit to avoid an incumbrance or undertenure in an entire estate sold for arrears of Government revenue, may be brought within twelve years from the time when the sale becomes final and conclusive. In this view, the suit would be within time. In my opinion, this contention is clearly right. It has been argued however by the learned Vakil for the respondents that Art. 14 is applicable, because the suit ought to be treated as one to set aside an order of an officer of Government in his official capacity. I am unable to accept this contention as sound. The plaintiff does not seek to set aside any order of an officer of Government; he sues to recover possession on the ground that he has purchased the property free of all incumbrances, and he has brought his suit within twelve years of the date when the sale became final and conclusive. It may be open to the defendants to show that the title which the plaintiff acquired at the sale has been subsequently extinguished; but if they do show this, the plaintiff will fail, not because his claim is barred by limitation, but because he has no subsisting title upon which to rest his claim. It may further be pointed out that Art. 14 has no application, where there is no order to be set aside, or where the order is a nullity and does not require to be set aside; see *Bejoy Chand v. Kristo Mohini* (1). In other words, where an order is null and void and does not affect the plaintiff's interest, so that there is no occasion or necessity to set it aside, Art. 14 has no application. On the other hand, if the plaintiff cannot succeed, on his title or recover possession so long as the order is not set aside, Art. 14 will apply; see *Moti Lal v. Karrabuldein* (2) and *Raghunath v. Kaniz*. (3) In the case before me, the suit is in substance, as it

(1) (1894) I. L. N. 21 Calc. 626. (2) (1897) I. L. R. 25 Calc. 179 P. C.

(3) (1902) I. L. R. 24 All. 467.

is in form, a suit for possession by a purchaser at a revenue sale ; no order has been pointed out to me as the one which the plaintiff seeks to set aside, or which is capable of being set aside. I must hold consequently, that the article applicable is Art. 121 and not Art. 14 which seems to me to refer to orders and proceedings of a functionary to which by law is given a particular effect in favor of one person or against another, subject in the regular course, to a further judicial proceeding having for its object to quash them or set them aside. (*Shivaji v. Collector of Ratnagiri*) (1). The first ground taken on behalf of the appellant must, therefore, prevail.

The second ground taken on behalf of the appellant refers to the question, whether or not the plaintiff has a subsisting title. I have already quoted the single sentence in the judgment of the Subordinate Judge in which this question is supposed to be disposed of. The learned Vakil for the respondents frankly admits that the question is very unsatisfactorily treated, but he seeks to support the judgment by reference to some observations of the Munsiff upon the question of limitation. This does not appear to me to be a satisfactory mode of dealing with an important question. An examination, however, of the judgment of the Munsiff shows that that officer as well as the Subordinate Judge have made a number of assumptions which are not well-founded. In the first place, it is quite clear from the case of *Prosunno Coomar v. Secretary of State* (2), as also from the history of the Settlement of Noabad lands as given in Mr. Cotton's Revenue History of Chittagong and the correspondence on the Settlement of Noabad lands, that a Noabad taluk is not necessarily temporarily settled ; it may be a permanently settled one. The resettlement of a Noabad taluk does not necessarily mean a settlement with new talukdars ; it may well be an adjustment of the revenue and nothing more. The learned Subordinate Judge is therefore in error in assuming that because a new settlement was made in 1895 or 1896, the taluk which the plaintiff purchased has become a nonentity. Before this conclusion could be supported a number of facts which have not yet been investigated would have to be determined. For instance, what were the incidents of the taluk purchased by the plaintiff, was it permanently settled or temporarily settled—would be a very important question. The learned vakil for the respondents observed that the plaintiff did not produce the original patta of the taluk ; but the learned

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(1) (1886) I. L. R. 11 Bom. 429.

(2) (1899) I. L. R. 26 Calc. 792.

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Vakil for the appellant very pertinently pointed out that the respondents who are the defaulting proprietors have the custody of the document, and that his client, the auction-purchaser could not be expected to produce it. Another question of fundamental importance would be, under what circumstances, did the settlement take place? Was it merely for assessment of revenue? If the original taluk was not permanently settled, was the new settlement made during the pendency or after the expiry of the term? Was any notice served upon the new talukdar, the auction-purchaser? Under what circumstances and in what character were the names of the defendants entered in the settlement papers? Was it because they were and claimed to be in 'actual occupation' as holders of a protected undertenure? Upon this question, the fact that the defendants have never paid Government revenue whereas the plaintiff has paid the same, will have an important bearing. I have stated enough to indicate that the question of title, which is the real question in the case, has not been properly tried, and when it comes to be considered after remand, it would be desirable to refer to chapter V. of Vol. V. of the Manual of Settlement of Noabad lands which deals with the question of the status of the Noabad talukdars. The Subordinate Judge may, in his discretion, allow the parties to adduce fresh evidence on this point, the bearing of which does not appear to have been rightly appreciated. If the question of title is decided in favour of the plaintiff, the further question, whether the defendants have any protected interest will require examination. The second point taken on behalf of the appellant must consequently be upheld.

The result, therefore, is that this appeal must be allowed, the decree of the Subordinate Judge set aside, and the case remitted to him for trial in accordance with the observations contained in this judgment. The costs of this appeal will abide the result.

This order, it is conceded, will govern appeals Nos. 2080, 2081 and 2162 of 1903.

Appeals allowed : cases remanded.

A. T. M.

Before Mr. Justice Coxe and Mr. Justice Doss.

BEPIN BEHARY SEN AND OTHERS

v.

KRISHNA BEHARY SEN.

CIVIL.

1908.

July, 7, 8.

Civil Procedure Code (Act XIV of 1882) Secs. 509, 522—Difference of opinion, no provision for—Judgment not in accordance with award—Appeal.

When the arbitrators have given an unanimous award, the award is not a nullity because no provision has been made in the order of reference for a contingency that has never arisen, viz., that the arbitrators might have differed.

Gour Chunder Bhattacharjee v. Sodoy Chunder Nundee (1) followed.

Futteh Singh v. Gango (2), *Thakoor Dass Chuckerbutty v. Ram Jeobun Chuckerbutty* (3) and *Muhammad Abid v. Muhammad Asghar* (4) distinguished.

Section 522 of the Code of Civil Procedure does not allow an appeal on the ground that the judgment is in excess of the award but only on the ground that the decree is so.

Appeal by the Defendants.

Appeal against an order confirming an arbitration award.

Babus Shib Chandra Palit and Jnanendra Nath Sarkar for the Appellants.

Babus Mohendra Nath Roy and Nogendra Nath Ghose for the Respondent.

The judgment of the Court was as follows :

This is an appeal against an order of the second Subordinate Judge of 24-Pergunnahs confirming an arbitration award.

July, 8.

A preliminary objection is taken by the respondent that under section 522 Civil Procedure Code no appeal lies. We think that this contention should prevail. It is argued on behalf of the appellant to meet this preliminary objection, *firstly*, that there was no valid award at all ; and *secondly*, that the decree is not in accordance with the award.

As regards the first point, the validity of the award is attacked on two grounds : *firstly*, that there was no provision in the order of reference to arbitration, for a difference of opinion among the arbitrators ; and *secondly*, that the award was not filed in due time. Another objection is also raised to the effect that the petition for reference to arbitration was not duly signed. But it is admitted that there is no evidence on this point and the learned pleader for the appellant very properly withdraws the objection.

* Appeal from Original Decree No 253 of 1906, against the decree of Babu Jogendra Nath Mukerjee, Subordinate Judge 2nd Court, of 24-Parganas, dated the 12th March 1906.

(1) (1871) 17 W. R. 30.
(2) (1865) 4 W. R. 4.

(3) (1870) 14 W. R. 150.
• (4) (1885) 1. L. R. 8 All. 64.

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On the question whether or not the award was filed in due time, we find from the order sheet that the arbitrators were directed to submit their report on or before the 10th July 1905. On the 10th July the following order was passed: "Read arbitration report. Time is allowed till 10th August 1905 for submission of their award". On the 10th August a similar order was passed allowing time till the 21st August and on or before the 21st August the arbitrator's award was filed. It is said that the Court had no power to extend the time for submission of the award except the application of the arbitrators, and it is said that as a matter of fact no such application was made, and there is no such application on the record. But we think we cannot go behind the distinct terms of the orders of the 10th July and 10th August. These orders recite that the arbitration report was read and we must take it that there was an arbitration report before the Court when this order was passed. Such a report can only have been the request of the arbitrators for further time, for there is no other matter to which it could have referred. We think therefore, that the objection that the award was not filed within the proper time necessarily falls to the ground.

Then as to the objection that the absence of any provision in the order of reference to arbitration for a difference of opinion among the arbitrators invalidates the whole award, we think that this too cannot succeed. Assuming for the sake of argument and only for the sake of argument, that an appeal would lie on such a ground, a view against which there is high authority, we do not think that the defect in the order of reference is at all vital. We have been referred to the cases of *Futteh Singh v. Gango* (1), *Thakoordass Chuckerbutty v. Ram Jeebun Chuckerbutty* (2) and *Muhammad Abid v. Muhommad Asghar* (3), in each of which an award was held to be invalid by reason of the absence of any provision for any difference of opinion in the order of reference. But in all these cases the arbitrators disagreed and it stands to reason that in such cases the award must fail because the arbitrators arrive at different conclusions, none of which is the opinion of the whole body of arbitrators, and no provision exists for reconciling the different opinions or for determining which opinion shall prevail. In such cases there is no real award at all. But that is no justification for finding, when the arbitrators have given an unanimous

(1) (1865) 4 W. R. 4.

(2) (1870) 14 W. R. 150,

(3) (1885) I. L. R. 8, All. 64

award, that the award is a mere nullity because no provision has been made for a contingency that has never arisen, namely that the arbitrators might have differed. For this view we have the authority of the case of *Gour Chunder Bhattacharjee v. Sodoy Chunder Nundee* (1). We think therefore that this objection also falls to the ground.

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Then there remains the objection that the decree is not in accordance with the award; of course, if this is the case, an appeal would lie in so far as the decree and award differ. But on reading the decree we find that it runs thus: "It is ordered and decreed that the suit be finally disposed of according to the arbitration award and the said arbitration award be considered as part of the decree. It is further ordered that the parties do get possession of their respective shares by demarcation of metes and bounds." It is very difficult to see how this decree can differ from the award which it embodies. But it has been argued before us that whether this is so or not, the learned Subordinate Judge goes considerably beyond the award in his judgment. But Section 522 Civil Procedure Code does not allow an appeal on the ground that the judgment is in excess of the award but only on the ground that the decree is so. The decree is the operative portion of the decision and we are not concerned with the question whether the judgment exceeds the award or not. Whether the Subordinate Judge in delivering his judgment went beyond the award or not, it is clear that he did not give effect to any thing beyond the award in the operative portion of his decision. We think therefore that as the decree is not shown to be in excess of or not in accordance with the award no appeal lies from the decision of the Subordinate Judge. The appeal is accordingly dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1871) 17 W. R. 30

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NOT EXCHANGEABLE AND
NOT SALABLE.

Before Mr. Justice Doss.

SURJA PROSAD THAKUR

v.

RAJMOHAN TOPEDAR AND OTHERS.*

CIVIL.

1908.

June, 18, 19.

Partition decree—Mortgagee, not made a party is binding on mortgagee—Findings in judgment—Mortgagee taking advantage of—Estoppel, mutual.

The judgment and decree in a suit for partition, to which a prior mortgagee is not made a party, are not binding upon the mortgagee.

Doona Sahu v. Joonarain Loll (1), *Bonomalee v. Koylash Chunder* (2), *Sita Ram v. Amir Begam* (3), *Soshi Bhusan v. Gogan Chunder* (4), *Keokuk and Western Railroad Company v. Missouri* (5), *Columbia Avenue &c. v. Dawson* (6), *Bancroft v. Wicomico* (7), and *Southern Bank v. Folsom* (8) followed.

The mortgagee in such a case cannot take advantage of any finding in the said judgment. The estoppel must be mutual.

Grija Kanta Lahiry v. Hurrish (9) relied upon.

Appeal by the Plaintiff.

Suit for declaration of title and for possession

The material facts and arguments appear from the judgment.

Babus Dwarkanath Chakravarti and Tarak Chandra Chakravarti for the Appellant.

Dr. Rash Behary Ghose and Babu Govinda Chandra Dey Roy for the Respondents.

The following judgment was delivered :—

C. A. V.

June, 19.

Doss J.—This is an appeal by the plaintiff in a suit to recover possession of 33 bighas odd of land in Mouzah Nathur Kona as appertaining to *Taluk Sarapdi Khan*. The plaintiff is the owner of 5 annas 6 gundas 2 koras 2 krants share in the Taluk, and seeks to recover possession of that share in the 33 bighas odd. In 1885 Brojo Mohun Biswas, father of Nobin Chunder Biswas, was the owner of Taluk Anandiram Biswas and of certain shares in Taluk Sarapdi Khan. On the 2nd of Bhadro 1292, corresponding to the 17th of August 1885, Brojo Mohun Biswas mortgaged Taluk Anandiram Biswas and another property to the ancestors of the defendants. More than two years after the mortgage, that is in December 1887, Ram Sunkar Bhaduri, who is one of the co-sharers

* Appeal from Appellate Decree No 157 of 1906 against the decision of Babu A. N. Mozumdar Subordinate Judge of Mymensingh dated the 25th September 1905, affirming that of Babu Kaliprasanna Sen, Munsiff, Netrokona dated the 8th April 1905.

(1) (1869) 12 W. R. 362

(2) (1878) I. L. R. 4 Calo. 692.

(3) (1886) I. L. R. 8 All. 324.

(7) (1903) 121 Fed. Rep. 874.

(8) (1896) 75 Fed. Rep. 929; See also Van Fleet's Former Adjudication Vol. II, p. 1078.

(9) (1872) 19 W. R. 114.

(4) (1894) I. L. R. 22 Calo. 364.

(5) (1893) 152 U. S. R. 301.

(6) (1903) 130 Fed. Rep. 152.

in Taluk Sarapdi Khan, brought a suit for partition of that Taluk against the present plaintiff, and Nobin Chunder Biswas, who at that time was the owner of 6 annas 13 gundas 1 kara 1 krant share of that Taluk and also against the owner of the remaining share. The decree in that suit was made on the 29th of June 1895. During the pendency of this partition suit, that is, in January 1890, the ancestors of the present defendants, that is the mortgagees, instituted a suit upon their mortgage and obtained a decree on the 24th of February 1890. In execution of that decree Taluk Anandiram Biswas was sold and purchased by the mortgagees on the 21st of January 1892. Under the partition decree, the disputed lands fell to the share of the plaintiff in lieu of his undivided one-third share in Taluk Sarapdi Khan. The plaintiff alleges that he was in exclusive possession of the disputed lands after the decree made in the partition suit, that the defendants under their purchase at the auction-sale in 1892 obtained collusive rent decree against the tenants on the land and thereby dispossessed him and he, therefore, brings the present suit for possession of the lands in dispute.

The Courts below have held that the defendants, who were prior mortgagees, not being parties to the partition suit, are not bound by the decree made in that suit, and, further, that the plaintiff has failed to prove that the disputed lands appertain to Taluk Sarapdi Khan. Upon these findings the Courts below have dismissed the plaintiff's suit.

The plaintiff filed in the Court of first instance a judgment and a decree of the year 1860 obtained by the ancestor of the present plaintiff against Brojomohun Biswas, under which, it is urged on behalf of the plaintiff, his ancestor obtained a decree for possession of 5 anna 6 gundas, 2 karas 2 krants share of the entire Mouzah Nathur Kona with other lands as appertaining to Taluk Sarapdi Khan. This judgment and decree were apparently not relied upon before the Munsiff, because no mention of these documents is to be found in this judgment. But they were strongly relied upon before the learned Subordinate Judge, and, he seems to have been of opinion that though the decree of 1860 showed that the entire Mouzah Nathur Kona belonged to Taluk Sarapdi Khan its effect was considerably impaired, if not wholly destroyed, by the findings in the judgment in the partition suit of 1895.

Both the Courts below have dismissed the plaintiff's suit. The plaintiff has appealed, and, on his behalf, insistent reliance

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has been placed upon the judgment and decree of 1860. What the effect of that decree is upon the present suit I shall deal with later.

I agree in the view taken by the Courts below that the judgment and decree in the partition suit of 1887 are not binding upon the defendants. See *Doona Sahoo v. Joonarain Loll* (1) *Bonomalee Nag v. Koylash Chunder Dey* (2), *Sita Ram v. Amir Begam* (3), *Soshi Bhusun Guha v. Gogan Chunder Shaha* (4). The same view has been taken by the Supreme Court of the United States in *Keokuk and Western Rail Road Company v. Missouri*, (5) by the Federal Courts (see *Columbia Avenue Savings Fund & Co. v. Dawson*, (6) *Bancroft v. Wicomico Country Commissioners* (7) *Southern Bank & Co. v. Folsom* (8) also by the Supreme Courts of most of the states; see *Cyclopedia of Law and Procedure* Vol. 23 p. 1268 (where most of the cases are collected). Though Mr. Justice Markby in his judgment in the case of *Bonomalee Nag v. Koylash Chunder Dey* (2) laid down the law with some decree of hesitancy, the essential reasons upon which that rule is based have subsequently been fully expounded in the luminous judgment of Mr. Justice Mahmood in the case of *Sita Ram v. Amir Begam* (3) and, if this view has, as I have indicated, been accepted by most of the Supreme Courts in America and also the unanimous judgment of the Supreme Court of the United States, there can scarcely be any room for doubt as to the soundness of the rule.

The rule of law that a puisne mortgagee is not bound by a judgment and decree obtained by a prior mortgagee against his mortgagor upon his mortgage, to which the puisne mortgagee is not a party, and that the amount, if any, due upon the prior mortgage must be proved afresh in his presence [see *Umesh Chunder Sircar v. Zahur Fatima* (9)] *Debendra Narain Roy v. Ramtaran Banerjee* (10) is merely another illustration of the same doctrine; similar instances are to be found in other legal relations as, for instance between grantor and grantee, assignor and assignee, lesser and lessee (herein with some apparent qualifications) and so forth. These rules are merely particular applications of a higher and more universal principle that a judgment can only

(1) (1869) 12 W. R. 362.

(4) (1894) I. L. R. 22 Calc. 364.

(2) (1878) I. L. R. 4 Calc. 692.

(5) (1893) 152 United States Reports 301.

(3) (1886) I. L. R. 8 All 324.

(6) (1903) 130 Federal Reporter 152.

(7) (1903) 121 Federal Reporter 874;

(8) (1896) 75 Federal Reporter p. 929, see also *Van Fleet's Former Adjudication* Vol. II p. 1078.

(9) (1889) L. R. 17 I. A. 201; I. L. R. 18 Calc. 164;

(10) (1903) I. L. R. 30 Calc. 599 (P. C.)

bind the quantum of interest (in the subject matter) represented in the suit and adjudicated upon thereby. The case of Hindu widow and a reversioner or that of successive shobdars, proves no real exception to this principle. The binding character of the judgment in such cases depends on the quantum of interest (in the subject matter) represented in the suit and this quantum varies according to the nature of the suit, or the character of the transaction adjudicated upon.

It has, however, been urged on behalf of the appellant that the case of *Dooma Sahoo v. Joonarain Loll* (1), *Bonomalee Nag v. Koylash Chunder Dey* (2), and *Soshi Bhusun Guha v. Gogan Chunder Saha* (3), ought to be reconsidered in the light of the decision of the Privy Council in the case of *Byjnath Lall v. Ramoodeen Chowdhry* (4) and the judgment of this Court in *Hem Chunder Ghose v. Thako Moni Debi* (5). In the first mentioned case, the Privy Council held that in the absence of fraud or collusion, a mortgagee of an undivided share of land, is bound by a partition held by the Revenue authorities and can only enforce his mortgage against such lands as have been allotted to his mortgagor in severalty at the partition. In the last mentioned case, the same principle was extended to a partition by the Civil Court. The grounds upon which this principle is based are stated by their Lordships of the Judicial Committee in the following passage at page 119 of Law Reports 1 Indian appeal: "It is, therefore, clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not by so doing, affect the interest of the other shares in them, and that the persons who took the security took it subject to the right of those shares to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty." In other words, the fundamental reason is that the persons who took the security took it *subject to the rights of those shares* to enforce a partition.

Now, does this reason apply to the case of a judgment between the mortgagor and a third person under the mortgage? Of course, if the defendants' ancestors had taken a mortgage of some share in taluk Sarapdi and had not been made a party to the subsequent suit for partition of that Taluk, they would, under these decisions, have been bound by this partition unless there

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(1) (1809) 12 W. R. 362 ;

(2) (1878) 1 L. R. 4 Calc. 692

(3) (1894) 1 L. R. 22 Calc. 364.

(4) (1874) L. R. 1 L. A. 106.

(5) (1893) 1 L. R. 20 Calc. 533.

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was fraud or collusion between the parties in the partition suit, and would have been entitled to enforce their mortgage against such lands only as had been allotted to their mortgagor on partition. But that is not the case here, the defendants claimed the disputed lands as part and parcel of taluk Anandiram Biswas, which taluk admittedly did not form the subject matter of partition. The real point in controversy between the parties is whether the disputed lands form part and parcel of taluk Sarapdi Khan or of taluk Anandiram Biswas. If the plaintiff in the partition suit and his co-sharers had before the suit for partition brought a suit against Nobin Chundra Biswas for declaration that the disputed lands appertained to taluk Sarapdi Khan and not to taluk Anandiram Biswas which was owned by Nobin and if in that suit judgment had been passed in favour of the plaintiff declaring the lands as forming part of taluk Sarapdi Khan, such judgment would not, according to the authorities I have mentioned have been binding upon the defendants, who *ex hypothesi* were no parties to such a suit. And, if after such judgment a suit for partition of taluk Sarapdi Khan had been brought upon the basis of this declaration, the decree in the partition suit would have been as ineffectual against the defendants as the judgment in the suit for the declaration, because the decree in the partition suit, in so far as it includes in the partition the lands in question proceeds upon the basis of the declaration in the previous suit. The decree for partition under consideration may be regarded as compounded of these two suits; and, the finding in the judgment that the lands in question form part of taluk Sarapdi Khan may be considered as a declaration previously made in an independent suit, when the defendants took a mortgage of taluk Anandiram Biswas from Nobin, they could not be said to have taken the security subject to the right of any co-sharers to enforce a partition, because admittedly in taluk Anandiram there were no co-shares. There were co-shares in taluk Sarapdi Khan, but the defendants' ancestors did not take a mortgage of taluk Sarapdi Khan. It seems to me, therefore, that the reasons which underlie the decision of the Privy Council in *Byjnath Lall v. Ramoodeen Chowdhury* (1), and *Hem Chunder Ghose v. Thako Moni Debi* (2), cannot affect the grounds of the decision in the cases of *Dooma Sahoo v. Joonorain Lall* (3), *Bonomalee Nag v. Koylash Chunder Dey* (4).

(1) (1874) L. R. I. A. 106.

(2) (1893) I. L. R. 20 Calc. 583.

(3) (1869) 12 W. R. 362.

(4) (1878) I. L. R. 4 Calc. 692.

Soshi Bhusan Guha v. Gagan Chunder Saha (1) and *Sika Ram v. Amir Begam* (2) or the ground of the decision in the present case. I am of opinion, therefore, that the defendants are not bound by the partition decree of 1895.

One of the reasons assigned by the learned Subordinate Judge for his view that the partition decree is not binding upon the defendants is that the respondents, that is, the defendants, had purchased Nobin's right in Nathur Kona as appertaining to both taluk Sarapdi Khan and taluk Anandiram in 1892, and that, therefore, Nobin had ceased to have any interest in the property partitioned, before the partition decree was made. This is evidently a mistake, because admittedly the defendants purchased taluk Anandiram only. They did not purchase taluk Sarapdi Khan.

Both the Courts below have found that, since December 1892, the defendants have been in possession of the disputed lands. The present suit was brought on the 4th of October 1904. Therefore, the possession by the defendants is within twelve years of the present suit.

I have now to consider the effect of the judgment and decree of 1860 to which I have already adverted. The learned Subordinate Judge, as I have said, is of opinion that the decree shows that the entire Mouzah Nathur Kona was the subject matter of the suit, but that its effect was nullified by the findings in the judgment in the partition suit. I do not think that this is a sound reason for, if the judgment and decree in the partition suit are not, as I have already pointed out, binding upon the defendants they can not be permitted to take advantage of any findings in that judgment: for, an estoppel must be mutual. [See the observations of the Privy Council in *Grija Kant Lahiry Chowdhury v. Hurrish Chandar Chowdhury* (3) and *Kesluk and Western Rail Road Company v. Scotland Country* (4)] I must therefore, consider the probative effect of the decree of 1860, or rather the summary of the claim stated in that decree, independently of, and as unaffected by the finding in the judgment in the partition suit. The judgment in the suit in which that decree was made shows that the main question between the parties was as to the extent of the share to which the plaintiff in that suit was entitled. There was no question raised as to whether the plaintiff had claimed lands of any other taluk except taluk Sarapdi Khan. No doubt, in the summary of the claim stated in the decree the claim is for a certain share

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(1) (1894) I L. R. 22 Calc. 364.

(2) (1888) I. L. R. 8 All. 321.

(3) (1872) 19 W. R. 114 at 117.

(4) (1811) 152 United States 318.

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of Mouzah Nathur Kona and other lands as appertaining to taluk Sarapdi Khan, but it is, in my opinion, not safe to rely upon such a statement in the absence of the pleadings in that suit. The question in the present case is whether the lands in dispute formed parcel of taluk Sarapdi Khan. I do not think that from this statement alone any positive inference can be drawn that the lands in dispute did really form part of the claim in the suit of 1860.

Both the courts below have, as I have said, held that the defendants have been in possession since December 1892: but it seems to me that the cardinal issue which ought to be tried for the purpose of determining whether the lands in dispute formed parcel of taluk Sarapdi Khan or Anandiram has not been tried and that issue is who in 1892, that is at the time when the defendants obtained possession under their purchase, and therefore, was in possession of the disputed lands. The plaintiff is admittedly the owner of 5 anna 6 gundas 2 karas and 2 krants share. If the disputed lands formed part of the Taluk Sarapdi Khan, one would naturally expect that the plaintiff would be in possession of a one-third share of the lands in dispute as forming part of taluk Sarapdi Khan. If he was in possession of the lands in suit in 1892, then that possession would have a two-fold consequence. It would show in the first place that the plaintiff was in possession within twelve years of the present suit, which undoubtedly he must prove in order to be able to succeed in the case; and, in the second place, it would raise an inference that the decree in 1860 probably included the lands in dispute, for he could not have obtained possession except under that decree. Thirty two years intervened between the date of that decree and the date when the defendants obtained possession. It is therefore all important to enquire who during that period was in possession of the disputed lands: If the plaintiff or his ancestor was in possession of the disputed lands as appertaining to taluk Sarapdi Khan, then he ought to be able to adduce conclusive evidence in proof of that fact. To my mind, it is the most essential question to be tried in this case, before any satisfactory solution can be obtained. I must, therefore, remand this case to the lower appellate Court for a finding upon this issue. The appeal will remain on the file of this court, and the question of costs will be decided at the ultimate hearing.

N. K. B.

Case remanded.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

THAKUR PROSAD *alias* SHUMBOO NARAIN

v.

PUNKAL SINGH.*

Civil,

1907,

August, 9.

Specific Relief Act (I of 1877) Sec. 42—Declaration, suit for, that a decree was fraudulent—Further relief—Court-fee how to be assessed—Plaint originally correctly framed—Subsequent amendment, defective—Restoration by appellate Court.

It is necessary for the plaintiff to ask not only for a declaration that a decree obtained against him was fraudulent but also for a consequential relief, *viz.* either to have the fraudulent decree set aside or to have a perpetual injunction granted to restrain the decree-holder from executing it.

Gour Mohun Gouli v. Dinonath Karmokar (1) followed.

A suit for a declaration that a decree obtained against the plaintiff was fraudulent, with a consequential relief, should ordinarily be valued at the amount for which the decree sought to be set aside was obtained.

Musst Bibi Umatul Bitul v. Musst. Nanji Koer (2) followed.

Where the plaint was originally correctly framed, but by reason of an unfounded objection as to deficiency of Court-fees taken by the defendant, the plaintiff withdrew his prayer for consequential relief, which resulted in the dismissal of the suit on the ground of its not being maintainable, the High Court in second appeal allowed the plaint to be amended and restored to its original form.

Appeal by the Defendant.

Suit to set aside a decree upon declaration that it was collusive and fraudulent and to save the holding from liability to auction sale.

The facts of the case and argument appear sufficiently from the judgment.

Babu Gunada Charan Sen (for *Babu Mohini Mohan Chatterji*) for the Appellant.

Babu Dwarka Nath Mitter for the Respondent.

The judgment of the Court was delivered by

Mookerjee J.—The circumstances which gave rise to the litigation out of which the present appeal arises may be briefly outlined. The plaintiff respondent holds in tenancy right 5 bighas 5 cottahs of land under the first defendant, who is the zemindar

* Appeal from Appellate Decree No. 2512 of 1905 against the Decree of E. Pantou Esq., District Judge of Sarun, dated the 7th September 1905, affirming that of Babu Bepin Behary Dey, Munsiff of Chapra 3rd Court, dated the 31st March 1905.

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of the village within which the lands are comprised. In 1901 the first defendant brought a suit for rent against the second defendant upon the allegation that the latter was a tenant in respect of the disputed property, and obtained an *ex parte* decree against him. He subsequently made an application to execute this decree with the result that the holding was advertized for sale on some date in September 1904. Thereupon, on the 13th September 1904, the plaintiff commenced this action to set aside the decree upon declaration that it was collusive and fraudulent, and to save the holding from the liability of auction sale. The plaintiff also prayed that his possession might be confirmed.

The claim was resisted by the first defendant alone at whose instance the question was raised, whether the plaint which bore a court-fee of ten rupees, was sufficiently stamped. It appears to have been argued that the plaintiff was bound to pay court-fees upon the value of the property in dispute which was estimated at Rs. 250. With a view to avoid this objection, the plaintiff withdrew the second and third prayers in the plaint, so that the suit thereupon became one for declaration that the decree passed on the 8th January 1902 was fraudulent and collusive.

The Court of first instance tried the suit on the merits and found upon the evidence that the second defendant had no title to the disputed holding and that the second defendant had been set up by the first defendant in order that the latter might obtain a fraudulent decree in execution of which the property might be ultimately sold. In this view of the matter, the Munsiff gave the plaintiff a declaration that the decree was fraudulent and collusive and also set aside the decree as prayed. The first defendant then appealed to the District Judge, and it was argued on his behalf that the suit was not maintainable because after the second and third prayers in the plaint had been withdrawn, the suit became one for a declaratory decree, and was consequently not maintainable under the proviso to section 42 of the Specific Relief Act. It was contended that it was open to the plaintiff to ask for consequential relief and that as no consequential relief was asked for in the amended plaint, he could not proceed with the suit.

The District Judge over-ruled this contention. He found upon the evidence that the decree was fraudulent and in this view of the matter dismissed the appeal.

The first defendant has now appealed to this Court, and on his behalf it has been argued that the suit is not main-

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tainable. In our opinion this contention is well-founded. The plaintiff was bound to ask for consequential relief, namely, either to have the fraudulent decree set aside or to have a perpetual injunction granted to restrain the first defendant from executing it. In the plaint as originally framed, such consequential relief was sought and in our opinion properly. As was pointed out by this Court in the case of *Gour Mohun Gonli v. Dino Nath Karmokar* (1), it is necessary for the plaintiff to ask for consequential relief in a case of this description, because if consequential relief is not asked for, it would be open to the decree-holder to proceed with the execution of the decree. The learned Judges of this Court in support of this view relied on the case of *Kunhamed v. Kutti* (2). In that case the plaintiff had asked for a declaration that a certain decree had been obtained against him by fraud, but had omitted to ask for a perpetual injunction to restrain the decree-holder from executing that decree. It was pointed out that the prayer for injunction was necessary, because it was only by an injunction that the plaintiff could really protect himself from execution proceedings being taken against him by the decree-holder who had obtained a decree by fraud. That this view is well-founded on reason is obvious from the circumstances of the present case. When the suit was instituted, the sale was impending and the plaintiff found it necessary to ask for a temporary injunction to restrain the decree-holder from proceeding with the execution pending the hearing of the suit in the Court of first instance. He obtained a temporary injunction which could have been granted only upon the assumption that ultimately in the suit a perpetual injunction would be granted to restrain the decree-holder from executing the decree. But after he had obtained the temporary injunction, he withdrew the prayer for perpetual injunction. In our opinion, it was not open to the plaintiff to adopt this course.

The learned vakil for the respondents placed reliance on the decision of the Allahabad High Court in the case of *Umro Singh v. Hardeo* (3), to show that a suit may be maintained for a declaration that the decree has been obtained by fraud, without any prayer for consequential relief. An examination of the case cited, shows, however, that there is no foundation for this contention. In the case which the learned Judges of the Allahabad High Court had to deal with, the plaintiff had asked for consequential relief,

(1) (1897) I L. R. 25 Calo. 49

(2) (1897) I. L. R. 14 Mad. 167.

(3) (1907) I L. R. 29 All. 418.

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because he had prayed that the decree obtained by the defendant might be declared fraudulent and set aside.

We must consequently hold that it was necessary for the plaintiff to ask not only for a mere declaration, but also that the decree might be set aside, or a perpetual injunction granted against the decree-holder. The plaint, as we have already stated, was originally framed correctly, but by reason of an unfounded objection as to deficiency of court-fees, taken by the defendant, to which the plaintiff yielded only too readily and to which effect was given by the Court of first instance without much consideration, the prayer for injunction was withdrawn; and the plaint as it now stands is open to objection. The proper course to follow under these circumstances is to allow the plaint to be amended and to restore it to its original form. There can be no substantial objection to this course, inasmuch as we find that the plaint as it originally stood, was correctly stamped. It was pointed out by this Court in *Musst. Bibi Umatul Batul v. Musst. Nanji Koer* (1) that in a case of this description the suit ought to be valued at the amount for which the decree sought to be set aside, has been obtained, because, if that decree is set aside, or a perpetual injunction is granted against the decree-holder, the effect is to deprive the decree-holder of the benefit which he would otherwise have obtained, and the fruits he would have realised by execution of the decree. In the present case, the decree which was sought to be set aside on the ground of fraud, was for the sum of Rs. 68, and the court-fees, which were paid on the plaint, were amply sufficient for this purpose. We, therefore, direct that the plaint be amended and restored to its original form.

The result is that this appeal fails, and must be dismissed with costs.

Appeal dismissed.

A. T. M.

(1) (1907) 6 C. L. J. 427, 11. C. W. N. 705.

Before Mr. Justice Caspersz and Mr. Justice Coxe.

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SRIMATI NAGENDRABALA CHOWDHURANI

AND OTHERS.

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May, 18, 19, 20.

Will—Daybhaga—Widow entitled only to maintenance, if can contest the validity of grant to idols or construction of will—Residence, restriction as to place of—"Just cause" for non-compliance—Maintenance, right to and amount, if can be limited by will—Hindu testator, power of, to deprive his widow of share of property—Maintenance, right of, if can be excluded by implication.

Where the plaintiff, being a widow of the testator, is entitled to maintenance and is a stranger to the estate, which, on an intestacy, would go to the adopted son, she is not competent to raise any question as to the validity of certain provisions in the will relating to the establishment and maintenance of certain idols or to have a construction of the entire will.

Brinda Chaudhrai v. Radhika Chaudhrai (1) followed.

One of the clauses of the will was as follows: "If, after my death, my wife resides in my house at Madhupur, or in my house at Benares, she shall, so long as she lives, get from my estate, an allowance of Rs. 125 a month for her maintenance and for doing religious or pious acts; if, instead of residing in my house at Benares, she resides at Calcutta or elsewhere, and, does not adopt a son according to the directions contained in para 2 of the will, or does not live a chaste life, she shall not get the aforesaid allowance, or any assistance or benefit from my estate." The testator's concubines were living in the Benares house, and the Madhupur house was not fit for human habitation and the widow proposed to live with the adopted son in Calcutta.

Held, that there was a just cause for the widow not to reside at Benares or at Madhupur, and a sum of Rs. 320 per mensem was a proper allowance for her maintenance, the excess over the sum of Rs. 125 was due to her as compensation for her inability to reside at Benares or at Madhupur and that the said amount of Rs. 320 should be made a charge upon the estate.

Per Caspersz J.—The amount of maintenance fixed by the testator himself, which is not a nominal amount, and which is not contrary to any provisions of Hindu law, cannot be varied by the Court.

A Hindu widow is not obliged to live a life of asceticism. She is bound to perform various religious, social and domestic ceremonies; she is not entitled to a bare subsistence or a starving allowance.

A Hindu widow cannot be deprived of her right to maintenance by any provision in a Dayabhaga Will.

A Hindu in Bengal may by will exclude his widow from her right to a share in his property on partition between her sons and grandsons.

Debendra v. Brojendra (2) referred to.

The right of a widow to maintenance cannot be excluded by implication.

* Appeal from Original Decree No. 180 of 1907, against the decree of Babu Kantl Chunder Mukerji, Subordinate Judge of Rungpur, dated the 8th April 1907.

(1) (1885) I. L. R. 11 Calc. 492.

(2) (1890) I. L. R. 17 Calc. 886.

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Per Coxe J.—A Hindu husband has not the right to reduce the amount of a chaste widow's maintenance below the proper provision. That provision has to be calculated on (a) the value of the estate and (b) the position and status of the deceased husband and the widow. In calculating the amount due on the second consideration great weight should be attached to a statement in the husband's will, not as being a legal limitation of the widow's right but as evidence as to what a lady in the position of his widow should need.

Nittokiasary Dassee v. Jogendro Nath Mullick (1) referred to.

Appeal by the Defendant No. 1.

Suit for the construction of the Will.

The facts of the case and argument appear sufficiently from the judgment.

Dr. Rash Behary Ghose and Babus Dwarka Nath Chuckerbutty, Fromstho Nath Sen and Harris Chunder Roy for the Appellant.

Mr. B. Chuckerbutty (Counsel) and Babus Nilmadhub Bose, Surendra Nath Roy, Provas Chunder Mitra and Sushil Madhub Mullick for the Respondents.

C. A. V.

The judgments of the Court were as follows :

May, 29.

Caspersz J.—Dakshina Mohan Roy Chowdhuri, a Hindu governed by the Dayabhaga law, executed a will, on the 5th November 1895, and a codicil to the same dated the 3rd July 1897. He died on the 22nd March 1898 leaving him surviving his widow Srimati Nogendra Bala Chowdhurani and an adopted son Dakshaja Mohun Roy Chowdhuri whom he had adopted on the date on which the codicil was executed. The widow contested the probate proceedings, but, in the end, probate was granted to the executors. She then instituted the suit, giving rise to the present appeal, for a construction of the will of Dakshina Mohun Roy Chowdhuri, alleging that she was beneficially intrested in the will and that certain of its provisions were invalid, inoperative, and ineffective.

The Subordinate Judge gave the plaintiff a modified decree. The surviving executor and the adopted son appealed to this Court ; but, on the conclusion of the argument for the executor, the adopted son was, on his application and without opposition, transferred to the category of respondents, and learned counsel on his behalf has argued in support of the finding of the Subordinate Judge with regard to the disposition creating certain *Debutter* property.

The Subordinate Judge has increased the plaintiff's main-

ance from rupees 125, the monthly sum mentioned in the will, to rupees 500 *per mensem*. He has declared the provisions of the will dedicating certain properties to the worship of the idols to be established at Benares to be invalid. He has, also, declared that the plaintiff shall not forfeit her right to maintenance for not living at Benares or at the family dwelling house at Madhupur in the district of Rungpore, and he has construed the will in other respects as appears from the decree framed in accordance with his judgment.

The executor Promotho Nath Roy is now the sole appellant, and Dr. Rash Behary Ghose has argued on his behalf that the provisions of clause 5 of the will, regarding the establishment of the thakuranis and a thakur at Benares, are valid according to Hindu Law, and that the plaintiff, being entitled to maintenance only, and being a stranger to the estate which, on an intestacy, would go to the adopted son, is not competent to raise any question as to the validity of the *Debutter*. It is, also, urged that unless the widow lives at Benares or at Modhupur, she will not be entitled to any maintenance, and that she must be limited to the monthly sum of Rs. 125 mentioned in the will of the testator.

The only clauses in the will calling for attention in the present appeal are the 5th and 14th clauses. In the 5th clause the testator says: "I have an intention to establish at Benares, after my name, the deities Dakshina Kali, Tara, Bhubaneswari Thakuranis and Dakshineswar Siva Thakur. During my life time I shall establish and consecrate the aforesaid Thakur and Thakuranis, construct temples for them, and make provisions for their *seba* (service) and worship. Should I happen to die, which God forbid, without having in my life-time established the said Thakuranis in that case, as soon as possible after my death, my begotten son, if any living, and in his default, my adopted son, or if there be any son living a minor, or in the absence of any begotten or adopted son, the executor of this will and, in his default, the person who may, according to the directions made below, be appointed administrator by the Judge of the District of Rungpore, for the time being shall from the income of my property other than the *debutter* property cause the aforesaid thakur and thakuranis to be established and consecrated and temples to be constructed for them, and consecrated at a cost not exceeding Rs. 7000 and the immovable properties mentioned in the schedule given in the foot of this will, shall be dedicated to and set apart for the said Dakshineswar Siva thakur and Dakshina Kali, Tara and

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Bhubaneswari Thakuranis to meet the expenses of their *seba* (service) and worship, and after my death the aforesaid properties shall be the absolute *debutter* properties of the said thakur and thakuranis and with the profits of the same the expenses of the deity and periodical worships, service and offering and other necessary expenses in connection with the same, and the expenses of the repairs of the thakurbaries and of the construction of new houses, when necessary, shall continue to be defrayed, but on no account there shall be daily given less than 30 seers of rice and *upakarans* suitable to the same, and the religious mendicants, beggars, poor Brahmins and Baisnabs will be fed with the *prosad* of the offerings so made. No *sebait*, and none of my heirs and representatives shall be able to create any incumbrance over or to make any transfer or make *putni* or any other kind of permanent settlement or any ijara settlement for more than 10 years, or do any acts injurious to the profits of the aforesaid *debutter* property and should he do so, it shall not stand valid."

It is obvious that the *Thakur* and *Thakuranis* had no material existence, by the names mentioned in the will, at the time of the testator's death. They were not personified or visualized, and if the case of *Upendra Bural v. Heri Chandra Bural* (1) was correctly decided, the gift or dedication of properties in favour of these deities was certainly invalid. It was there observed "if there was a gift to the idol, it was bad because there was no idol in existence at the time of his death; if there was a power to make such a gift the power was ineffective because, on the authority of *Bai Motwahoo v. Bai Mamooabai* (2) we think that a power must be to convey to a person, who was in existence, either actual or in contemplation of law, at the death of the testator, and the idol to which the dedication is sought to have been made was not then in existence."

The learned Judges then proceeded to say, "the deity, no doubt, is always in existence, but there could be no gift to the deity as such, and there was no personification of the deity to whom the gift could have been made or who was capable of taking it." The same point was similarly decided by Mr. Justice Stanley in *Rajamoye Dass v. Trolokho Mohiny Dass* (3) and by Mr. Justice Stephen in *Nagendra Nandini Dass v. Benoy Krishna Deb* (4). If it were necessary to decide the point, we

(1) (1897) I. L. R. 25 Calc. 405.

(2) (1897) I. L. R. 21 Bom. 709; I. L. R. 24 I. A. 93

(3) (1901) I. L. R. 29 Calc. 260 (273). (4) (1902) I. L. R. 30 Calc. 521.

should be disposed to accept the view of law which has prevailed since the earlier case of *Durga Prosad Das v Sheo Prosad Pandah*, (1) cited in the judgment of Mr. Justice Stanley. But, in our opinion, the widow is not competent to raise such a question, or to have a construction of the entire will. The 5th clause, of which she seeks construction, does not militate against her interest which is restricted to maintenance on the conditions specified in the 14th clause of the will. In this view we are supported by the decision in *Brimla Chowdhurani v. Radhica Chowdhurani* (2) where it was said that a widow is entitled to maintenance and to bring a suit to have her maintenance made a charge upon the estate of her deceased husband. This case was distinguished by Banerji and Stephen JJ in *Garabini Dass v. Protap Chandra Shaha* (3) But the learned Judges thought that they were entitled to look at the provisions of the will of the adopted son of the widow's husband in order to see if it really affected the right of the widow to maintenance, and, looking at the will, they said that it did not affect her right in any way whatever. It follows, in our opinion, that the widow's interest must be restricted to her claim for maintenance, and that other questions regarding the construction of the will must be dealt with between the executor representing the estate and the adopted son who is the beneficiary under the will. The adopted son, Dakshaja Mohan Roy Choudhuri, never sought to have construction of the will of Dakshina Mohan Roy Choudhuri. He is not entitled in his new capacity as respondent, to have construction as against the executor who was a co-defendant in the suit as originally brought by the widow. The contrary view would enlarge the scope of the present litigation which, as we have said, must be restricted to the interest of the widow only.

Coming then to the question of maintenance and residence we observed that the 14th clause of the will of Dakshina Mohan Roy Choudhuri was based on the assumption that his widow would adopt a son in accordance with the authority delegated to her by the second clause of the will. He having himself taken a son in adoption, by his codicil of later date, the 14th clause must be read subject to the codicil wherein he declared that "should the aforesaid will made by me, contain any provisions contrary to this codicil, they shall be inoperative and the provisions of this codicil shall prevail."

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(1) (1880) 7 C. L. R. 278.

(2) (1885) I L. R. 11 Calc. 492.

(3) (1900) 4 C. W. N. 602.

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The 14th clause consists of four parts : “ (1) If, after my death, my wife, the said Nagendra Bala Choudhurani, resides in my house at Madhupur or in my house at Benares, she shall, so long as she lives, get from my estate an allowance of Rs. 125 a month for her maintenance and for doing religious or pious acts. (2) Except receiving that fixed allowance, she shall have no right to the *debutter* or other properties left by me, nor shall she be able to interfere with the same in any way. (3) If, instead of residing in my house at Madhupur or in my house at Benares, she resides at Calcutta or elsewhere, and does not adopt a son according to the directions contained in para 2 of this will, or does not live a chaste life, she shall not get the aforesaid allowance, or any assistance or benefit from my estate. (4) If there be any disagreement between my said wife and my begotten son or adopted son, and if my wife like to live separately, in that case, if she lives at Benares she shall get two rooms either on the first floor or on the second floor of my Benares house to live in and, if she resides in my Madhupur house, she shall construct four thatched huts within the compound of that house, which is surrounded by walls on all sides and live in the same and she shall get from my estate reasonable expenses for the construction and repairs of those huts.”

The first sentence confers an absolute right to receive Rs. 125 a month provided the widow resides in the testator's house at Madhupur or in his house at Benares. The second sentence takes away all right to the *debutter* and other properties, and we may observe that it precludes her from seeking a construction of the 5th clause as we have already held. The 3rd sentence has ceased to be operative because the testator himself adopted a son and the widow can not be visited with any penalty for omitting to comply with the wishes of her husband. The fourth sentence, also, appears to be inapplicable to the present circumstances. There is no disagreement between the widow and Dakshaja Mohan Roy Chowdhuri. But this sentence is important as showing that the testator desired his widow and adopted son to live in the same house either at Benares or at Madhupur, and effect should be given to this very proper intention on the part of the testator when the question of his widow's residence comes to be settled.

It is unnecessary to consider the precise meaning of the term “residence” ; whether exclusive residence or the occasional use of the testator's house would be sufficient compliance with the

provisions of the 14th clause; see *Gyanendra Mohan Tagore v. Raja Fotindra Mohan Tagore* (1). On the facts, we agree with the Subordinate Judge in thinking that there is "just cause" for the widow not to reside at Benares or at Madhupur. The testator's concubines are living in the Benares house, and the Madhupur house is not fit for human habitation owing to the earthquake of 1897. One of the concubines is an old woman with a family; the other is a *kaharin*, and no Hindu lady could live in the same premises with such persons consistently with her position and dignity.

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The most difficult question, however, is whether the widow can challenge the express provisions for her maintenance. It is unnecessary, for the purpose of the present litigation, to consider whether she could challenge the will if no maintenance at all had been allowed to her. It has been held in *Debendra Coomar Roy Chowdhuri v. Brojendra Coomar Roy Chowdhury*, (2) that a Hindu in Bengal may by will exclude his widow from her right to a share in his property on partition between her sons and grandsons. But this is not the case here. Again, the right of a widow to maintenance can not be excluded by implication. This, also, is not the case here. As Mr. Mayne observes, in his treatise on Hindu law and usage (7th edition, page 628) 'The right of a widow to her maintenance arises by marriage. It seems, therefore, contrary to principle to hold that by devising property to another the husband can authorise that other to hold it free from the claim which neither he himself nor his heir could have resisted,' and it seems, on the authorities, that a widow cannot be deprived of her right to maintenance by any provisions in a Dayabhaga will.

But, in our opinion, these larger questions do not properly arise in the present case. Here there is a will of which probate has been granted, and we have to construe that will and not to make a new will for Dakshina Mohan Roy Chowdhuri. The conclusion can not, in my opinion, be resisted that the amount of maintenance fixed by the testator himself, which is not a nominal amount, and which is not contrary to any provision of Hindu law, can not be varied by the Court. But, I think that this Court is at liberty, in effectuating the wishes of the testator, to place a reasonable construction on the 14th clause of the will by compensating the widow for her inability to reside at Benares or at Madhupur. She cannot reside at either of those places owing

(1) (1874) L. R. 1 I. A. 387 (394). (2) (1890) I. L. R. 17 Calc 886.

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to no fault of her own. The executor might no doubt make arrangements for the widow's residence. But this would be an unsatisfactory solution of the difficulty, regard being had to the persistent litigation which has been going on, and it would probably result in further disagreement. Moreover, the 14th clause does not contemplate that the widow should reside at Benares or at Madhupur apart from the adopted son; and, as the adopted son Dakshaja Mohan is living in Calcutta, the widow may reasonably ask to be allowed to live near him. What then, would be a proper monthly sum to be paid to the widow to enable her to comply with the intentions of her late husband? The sum of Rs 125 per mensem is obviously inadequate. It was raised to Rs 320 by an order of this Court during the probate proceedings, and, in the absence of anything to the contrary, that sum commends itself to us as adequate. From the deposition of Kumar Chandra Kishore Roy it appears that his mother received Rs. 50 a month, but she had not to pay house rent, wages of servants, and boarding expenses (page 232 of the paper book). The witness Bepin Chandra Roy Chowdhuri deposed that his mother received, besides maintenance, whatever was needed at any time. There is abundant authority to show that a Hindu lady, in the position of the respondent Nagendra Bala Chowdhurani, is not obliged to live a life of asceticism. She is bound to perform various religious, social and domestic ceremonies. She is not entitled to have subsistence or a starving allowance. The Subordinate Judge has fixed a monthly allowance of Rs 500 which he arrived at on a consideration of certain reported cases where there were no wills in the way fettering the discretion of the Court. If there had been no will in the present case, we would not have interfered with the discretion of the Court below though, to a certain extent, the Subordinate Judge is wrong in taking into consideration the wants of the widow's father and other relations. He has allowed Rs 50 monthly on that account, and, in any event, this part of his judgment could not be sustained.

In our opinion, the proper amount to be paid to the respondent Nagendra Bala Chowdhurani is Rs 320 *per mensem*. The excess over the sum of 125 allowed by her husband being, in our opinion, due to her as compensation for her proved inability to reside at Benares or at Madhupur.

The decree of the Court below will be varied in accordance with our observations. The findings of the Subordinate Judge,

with regards to the *debutter* property and the other like provisions in the will, must be expunged. The result is that Nogendra Bala Chowdhurani will receive her maintenance and compensation from the 18th November 1905 at the rate of Rs. 320 per month during her lifetime from the estate of the late Dakshina Mohan Roy Chowdhuri, by whomsoever represented, that she shall not forfeit her right to that monthly sum for not living in the house at Benares or at Madhupur, and that she will have a charge upon the estate for the said monthly sum so decreed. The costs of this appeal will come out of the estate.

Coxe J.—I agree that the allowance of Rs. 320 is suitable, that the widow has just cause for not living at Madhupur and Benares and that she has no *locus standi* for contesting the grant to the thakurs in this suit. But I am not prepared to admit the proposition that a Hindu husband has the power of limiting the amount of his widow's maintenance by will. No authority has been shown us for this proposition and though there is no direct authority against it there is a considerable amount of indirect authority. It is well settled that the husband cannot deprive a chaste widow of maintenance altogether and the question arises whether this is because the Hindu Law directs that he shall provide for her maintenance or because her right of maintenance is a right paramount or superior to his power of testamentary disposition. It appears to me that the balance of authority is in favour of the latter view. It was laid down in *Jamna v. Muchul Sahu* (1) which was followed in *Becha v. Mothua* (2) that a husband could not deprive his widow of maintenance altogether, and the ground assigned was that the wife is in a subordinate sense a co-owner with her husband in the whole of his property. Babu Golap Chandra Sarkar in his work on Hindu Law states that there cannot be any doubt that under Hindu Law a widow's maintenance is a legal charge on the husband's estate and though this cannot be said to be a correct statement of the law if it means that it is a charge that finds the property in the hands of persons who have purchased it honestly, without notice and without any attempt to defraud the widow of her rights, still there are numerous cases that lay down that in the hands of heirs, and of purchasers colluding with heirs to defeat the widow's rights, the property is charged with the widow's maintenance. I may refer for example to the remarks of Wilson J. in *Sorolah Dasi v. Bhoban Mohun Neoghy* (3).

(1) (1879) I. L. R. 2 All. 315.

(2) (1900) I. L. R. 23 All. 83.

(3) (1888) I. L. R. 15 Calc. 292.

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If then a husband cannot deprive a widow of maintenance, because she is in a subordinate sense a co-owner with him in the property and her right to maintenance is in a limited way a charge on the property, it seems logically to follow that he cannot limit its amount. It seems illogical to say that when the question is whether the husband can deprive his widow of maintenance, her right to maintenance is superior to his power of testamentary disposition but that when the question is how much the widow ought to have, his power of testamentary disposition is superior to her right to maintenance.

It is true, of course, that a husband can within limits lay down that his widow shall forfeit her maintenance if she does not live in the family house. This certainly, at first sight, seems to make her rights subject to his power of disposition. In the Calcutta cases on this point the question was whether the widow forfeited her rights under the will on a breach of the condition, and the question whether she forfeited her rights under the law outside the will does not seem to have been considered. But in the Bombay cases it was decided that she forfeited her rights altogether. At the same time it must be remembered that in the eyes of Hindus the family house is undoubtedly the proper place for the widow to reside, and the special right given to the husband to insist on her living there need not necessarily be regarded as making the right to maintenance entirely subject to the husband's power of disposition.

It is true, too, that a husband can by will deprive his widow of a right to a share on partition. *Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry* (1). But that is quite a different thing to depriving her of maintenance and, in the case quoted, the latter right was admitted. I cannot, therefore, agree that a Hindu husband has the right to reduce the amount of a chaste widow's maintenance below the proper provision. That provision has to be calculated on (i) the value of the estate and (ii) the position and status of the deceased husband and the widow. *Sreemutty Nettokissory Dossee v. Jogendro Nath Mullick* (2). I agree, however, that in calculating the amount due on the second consideration great weight should be attached to a statement in the husband's will, not as being a legal limitation of the widow's right but as evidence as to what a lady in the position of his widow should need. And I think the learned Subordinate Judge has not given sufficient consideration in this case to the husband's

(1) (1890) I. L. R. 17 Calc. 886

(2) (1878) L. R. 5 I. A. 55.

estimate of his widow's needs. I think the allowance of Rs. 320 sanctioned by the Court of Wards which usually merely makes careful enquiries into matters of this kind is a reasonable allowance and may be granted.

It follows from the above remarks that in my opinion the widow's rights are not in any way affected by the attempted grant to the thakurs and that she has no *locus standi* for questioning those grants in this suit.

A. T. M.

Decree varied.

Before Mr Justice Mookerjee.

PRAYAD DAS AND ANOTHER

v.

MOHUNTH KRIPARAM *

Shebaitship—Mohunth—Transfer, power of—Superior and Subordinate Mutt, relation of—Election of Mohunth—Custom Governing Mutt—Conditional decree giving possession till a Mohunth is duly installed, if to be passed.

A Mohunth of a mutt can not transfer the right of management vested in him, though coupled with the obligation to manage in conformity with the trust annexed thereto.

Rajah Varmah v. Ravi Varmah (1) and *Ginana Sambanda v. Velu Pandaram* (2) referred to.

Where one mutt is subordinate to another in the sense that the latter has the right of nomination of the Mohunth of the former, the Mohunth of the former mutt can not by a deed of transfer alienate his rights in favour of the Mohunth of his superior mutt.

There is no fixed rule which regulates the relation between a superior and a subordinate mutt; even if a mutt is subordinate to another, it must be governed by its own rules of management.

Kashi Bashi Ramlal v. Chitumbernath (3) and *Giyana Sambandha v. Kandusami* (4) referred to.

In the case of mutts the custom governing the particular establishment has to be proved.

Greedhkar v. Nandokisore (5), *Janaki Debi v. Gopal* (6) and *Muttu Ramalinga v. Parianayagum* (7) referred to.

In the case of mutts, there is no uniform custom applicable to all mutts so far as the question of succession to the office of Mohunth is concerned.

Vidyapurna v. Vidyandhi (8) referred to.

* Appeal from Appellate Decree, No. 1421 of 1905, against the decree of Babu Surjanarain Das, Subordinate Judge of Purnea, dated the 15th April 1905 reversing that of Mr. Mahmood Hasan, Munsiff of that place, dated the 23rd December 1904.

(1) (1876) L. R. 4 I. A. 76.

(2) (1899) I. L. R. 23 Mad 271; I. R. 27 I A. 69.

(3) (1873) 20 W. R. 217 P. C.

(4) (1886) I. L. R. 10 Mad. 375.

(5) (1887) 11 M. I. A. 405

(6) (1882) 1 L. R. 9 Calo. 766; L. R. 10 I A. 32; 13 C. L. R. 30.

(7) (1874) 1 Mac. I A. 209.

(8) (1903) I. L. R. 27 Mad. 435 at 457.

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In cases in which a *Mohunth* is allowed by custom to nominate his successor by word of mouth or by a will, such nomination is subject to the confirmation of the entire body of *Sanyasis* of different *mutts*, who are invited to be present at the ceremony of installation when the new *Mohunth* is invested with the *Chudder* or the robe of office.

When no custom is proved and no authority in the outgoing *Mohunth* to make a nomination is established, the *Mohunth* should be elected by all the *Sanyasis* of the institution.

Madho Dass v. Kanta Das (1) and *Mahanth Ramji Dass v. Lachhu Dass* (2) referred to.

Where the plaintiff has not asked for declaration of his rights to nominate a *Mohunth* for another *mutt*, nor in the plaint stated precisely the nature of the relations between the two *mutts* but claimed title in himself on the basis of the *Supardinama* (which created no valid title in him in the disputed properties), he can not, at the appellate stage of the case, be permitted to turn round and say that he is entitled to have a decree for administration, to recover possession of the disputed properties and to keep such possession till a *Mohunth* has been appointed.

Sathappayyer v. Periasami (3) distinguished.

Appeal by the Defendants.

Suit for recovery of properties, movable and immovable, belonging to a *mutt* and several other *mutts* said to be subordinate thereto.

The facts of the case and argument appear sufficiently from the judgment.

Babus Nalini Ranjan Chatterjee and Khetra Mohun Sen for the Appellants.

Babus Nilmadhub Bose and Nanda Lal Banerji for the Respondent.

C. A. V

The judgment of the Court was delivered by

April, 1907.

Mookerjee J.—This is an appeal on behalf of the defendants in an action commenced against them by the plaintiff-respondent for recovery of properties, movable and immovable, belonging to the Madhubani *mutt* and several other *mutts* said to be subordinate thereto. The case for the plaintiff as stated in the plaint is that he is the Mohunth of the Patiala *mutt* in the Punjab; that the Mohunths of Madhubani *mutt* receive *chudder* or robe of office from the Patiala *mutt* at the time of their installation; and that the properties of which he claims to recover possession were acquired by the Mohunths of the Madhubani *mutt*, the last of whom Mohunth Ganga Das transferred all his rights to the plaintiff by a

(1) (1878) I. L. R. 1. All. 539.

(2) (1902) 7 C. W. N. 145.

(3) (1890) I. L. R. 14 Mad. 1.

document called a *supardanama* on the 15th December, 1903. The defendants are alleged to be trespassers who had been originally appointed as agents by Mohunth Ganga Das when in 1901 he went on pilgrimage, and upon his return, had refused to deliver possession to him. The plaintiff therefore seeks for declaration of his title based upon the *supardanama* and asks for recovery of possession of the properties belonging to the Madhubani *mutt* and to the *mutts* subordinate thereto. The defendants resisted the claim of the plaintiff upon various grounds amongst which it is sufficient to mention that they denied that the plaintiff had acquired any valid title under the document which is the foundation of his claim. They also alleged that the *mutt* was under the management of Babu Nanak Pershad and they had acted as his agents for over eight years. The Court of first instance held that the plaintiff had no title to the disputed properties under the *supardanama* inasmuch as the Mohunth of the Madhubani *mutt* had no disposing power over the properties. In this view of the matter the learned Munsiff dismissed the suit. Upon appeal the Subordinate Judge has reversed that decision. In his opinion the main question in the case was, what was the custom and practice in the selection and appointment of Mohunth for the Madhubani *mutt* and whether in that respect the Madhubani *mutt* was part of and subordinate to the Patiala *mutt*. He answered this question in favour of the plaintiff. He also found that the defendants originally came into possession of the disputed properties as agents of the last Mohunth Ganga Das and that they had no title to continue in occupation after his death. As regards the deed of *supardanama* upon which the claim of the plaintiff is based, he held that it was operative inasmuch as it was in substance a resignation of the office of Mohunth and of the charge of the trust properties to the appellant as the superior of the endowment and the chief controlling authority in whom the trust properties were really vested. The Subordinate Judge also held in the alternative that the *supardanama* could be construed as a deed whereby the last Mohunth Ganga Das retired and practically nominated the appellant to be the superior Mohunth of the Madhubani *mutt*. In this view of the matter, the Subordinate Judge made a decree in favour of the plaintiff, against which the defendants have appealed to this Court. During the pendency of the appeal one of the defendants has died without leaving any legal representative and the appeal has been heard at the instance of the surviving defendant. The

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decision of the Subordinate Judge has been challenged, substantially, on two grounds; namely, *first*, that the question which is described by the Subordinate Judge as the main question in the case was never raised in the Court of first instance and that the decision of the appeal ought not to have been made to depend upon the decision of such a question; *secondly*, that the Subordinate Judge has misunderstood the legal effect of the *supardanama* under which it ought to have been held that the plaintiff had acquired no valid title to the properties in question. In my opinion each of these contentions is well-founded and must prevail.

In support of the first contention of the appellant, reference has been made to the plaint, an examination of which manifestly shows that the claim of the plaintiff is based upon the deed executed by Mohunth Ganga Das on the 15th December 1903. No doubt, it is stated in paragraph 2 of the plaint that the Mohunths of the Madhubani *mutt* upon their installation get the Mohunth's *chudder* from the Patiala Mohunth, but it is nowhere suggested that the *mutt* at Madhubani is part of and subordinate to the Patiala *mutt*. The general question which was raised by the Subordinate Judge as to the custom and practice in the selection and appointment of Mohunth for the Madhubani *mutt* and whether the Madhubani *mutt* was a part of and subordinate to the Patiala *mutt*, is not covered by the second and third issues raised in the case. The learned Subordinate Judge appears to have appreciated the difficulty and this is clear from the language he uses, namely that "the question was *sufficiently indicated* by the second and the third issues framed by the lower Court." I must hold consequently that the general question of the subordination of the Madhubani *mutt* to the Patiala *mutt* does not properly speaking arise upon the plaint. It is not necessary however to rest the decision of this appeal on this ground, because, in my opinion, the appellant is entitled to succeed on the merits.

The second ground upon which the decision of the Subordinate Judge is challenged is that the deed executed by Mohunth Ganga Das, called the *supardanama* did not create any valid title in favour of the plaintiff and that the plaintiff is not entitled on the basis thereof to recover possession of the disputed properties. In my opinion the plaint makes it abundantly clear that the title of the plaintiff is based upon the *supardanama* and the *subardanama* alone. There is no allegation in the

plaint that the plaintiff is entitled to succeed on the basis of any title independent of the *supardanama*. The plaintiff does not allege that the relation between the Patiala *mutt* and the Madhubani *mutt* was of such a character that the Mohunth of the former *mutt* was entitled as the head of the superior *mutt* to recover possession of properties belonging to the latter *mutt* and also of all *mutts* subordinate thereto. If the plaintiff had based his claim on any such allegation, the relationship between the two *mutts* ought to have been specifically alleged and put in issue. The plaint however is entirely silent upon this point, and I have no doubt that the title of the plaintiff must be determined upon reference to the *supardanama* and the *supardanama* alone. The *supardanama* states that Mohunth Ganga Das was a disciple of Mohunth Sath Narain Das, that the *mutts* mentioned in the document were acquired by Berhan Bilas Das who was a *chela* of the Mohunth of Patiala, that the Mohunths of the Madhubani *mutt* were appointed under the orders of the Mohanath of Patiala, and that the *chudders* used to be granted to them on the occasion of their installation. The deed then recites that the executant was very ill and apparently unable to carry on the duties of the endowment specially as he had no *chelas* or *Guru Bhais* or *chelas* of his spiritual preceptor. He therefore conveyed and entrusted to the present plaintiff, the Mohunth of the Patiala *mutt*, the properties of the Madhubani *mutt* and of the several subordinate *mutts* mentioned. The deed concludes that the Mohunth of the Patiala *mutt* would be at liberty to deal with the properties in any way he liked and to manage them as the Mohunth. It is quite clear therefore that under this document the executant renounced all his rights as Mohunth and conveyed whatever interest he had in the properties of the *mutt* to the grantee. The question consequently arises, whether a transfer of this description is valid and operative under the Hindu Law. Now it is settled beyond the possibility of all controversy that a Mohunth of a *mutt* cannot transfer the right of management vested in him, though coupled with the obligation to manage in conformity with the trusts annexed thereto. It is sufficient to refer to the decisions of their Lordships of the Judicial Committee in *Raja Vurmah v. Ravi Vurmah* (1) and *Gnanasambanda v. Velu Fandaram* (2). In the second of these two cases, it was stated by Sir Richard Couch that an assignment by the manager of a *mutt*

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(1) (1876) L. R. 4 I A 76

(2) (1890) L. R. 27 I A 69. I. L. R. 23 Mad 271.

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of the right of management thereof was beyond his legal competence under the common law of India, and that in the case before the Judicial Committee no custom to do so had been established. This principle is based upon the obvious ground that if an office to which are attached essentially the conduct of religious worship and the performance of religious duties were held to be transferable, the very object of the religious foundation might be defeated. The learned vakil for the respondent did not controvert this position, but he argued that as the transfer in this particular case had been made to the head of the *mutt* to which the Madhubani *mutt* was in a sense subordinate, the transfer was operative. In my opinion, there is no foundation for this contention. In the first place, as I have already stated, no specific allegation was made in the plaint as to the precise relation between the Patiala *mutt* and the Madhubani *mutt*. In the absence of any such allegation, it is impossible to hold that as a matter of law the Mohunth of the Madhubani *mutt* is entitled to transfer the Mohunthship of the Madhubani *mutt* and the title to all the properties belonging thereto, to the head of the Patiala *mutt*. As has been repeatedly pointed out by their Lordships of the Judicial Committee, in the case of *mutts* the custom governing the particular establishment has to be proved. See *Greedharee v. Nundokissore* (1), *Janoki Debi v. Gopal* (2) and *Muthu Ramalinga v. Perianayagum* (3). In the case before me, there is a special reason why this rule should be observed. The Madhubani *mutt* is an endowment of recent origin. In all probability, there is no ancient custom which may be regarded as enforceable in law. It would be necessary, therefore, to determine the precise relation between the Madhubani *mutt* and the Patiala *mutt*, if the one is really subordinate to the other, by reference to the rules laid down by the founder. In the second place, in the case of *mutts* it is well established that there is no uniform custom applicable to all *mutts* so far as the question of succession to the office of Mohunth is concerned. As was pointed out by the learned Judges of the Madras High Court in *Vidyapurna v. Vidyavidhi* (4), "In most cases the successor is ordained and appointed by the head of the *mutt* during his own life time, and in default of such nomination, the nomination may rest with the head of some kindred institution, or the successor may be

(1) (1867) 11 M. I. A. 405.

(2) (1882) L. R. 10 I. A. 32, 1 L. R. 9 Cal. 766; 13 C. L. R. 30.

(3) (1874) 1 Mac. I. A. 209.

(4), (1903) 1 L. R. 27 Mad. 433 at 457.

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appointed by election by the disciples and followers of the mutt, or in the last instance, by the court representing the sovereign." It is well-known however that in cases in which a mohunt is allowed by custom to nominate his successor by word of the mouth or by a will, such nomination is subject to the confirmation of the entire body of *sannyasis* of different mutts who are invited to be present at the ceremony of installation, when the new Mohunth is invested with the *chudder* or the robe of office. In cases in which the Mohunth has no power of nomination, he is sometimes elected by all the *sannyasis* of the mutts of his order. It may be taken as a general rule that when no custom is proved and no authority in the outgoing Mohunth to make a nomination is established, the Mohunth should be elected by all the *sannyasis* of the institution. *Madho Das v. Kamla Das* (1) and *Mahanth Ramji Dass v. Lachhu Dass* (2). Even if we assume therefore that the Madhubani mutt is subordinate to the Patiala mutt in the sense that the Mohunth of the Patiala mutt has the right of nomination of the Mohunth of the Madhubani mutt, it does not follow in the least that the Mohunth of the Madhubani mutt is entitled by a deed of transfer to alienate his rights in favour of the Mohunth of his superior mutt. It may be observed that there is no fixed rule which regulates the relation between a superior and a subordinate mutt; even if a mutt is subordinate to another, it must be governed by its own rules of management. See *Kashi Bashi Ramling v. Chitumbarnath* (3) and *Giyana Sambandha v. Kandasgni* (4). The claim which has been set up by the learned vakil for the respondent, on behalf of the Mohunth of the Patiala mutt is, in my opinion, of an exceptional character, and is not supported by any authority to which my attention has been invited. That claim is that it is open to the Mohunth of the subordinate mutt to transfer the mutt and its properties to the Mohunth of the superior mutt, so that the one may be merged completely in the other and the Mohunth of the superior mutt may not only continue as such Mohunth but also become practically the Mohunth of the subordinate mutt. I have not been able to trace any authority which supports such a position as this. It is admitted in the case before me that Ganga Das, the last Mohunth of the Madhubani mutt, died shortly after he executed the deed of *supardanama* on the 15th December 1903. Since then, it is stated, no steps have

(1) (1878) I. L. B. 1 All 539.

(2) (1902) 7 C. W.-N. 145.

(3) (1873) 20 W. R. 217.

(4) (1886) I. L. B. 10 Mad. 375.

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been taken for the appointment of his successor. If the case of the plaintiff be true, he ought to take the initiative in this matter. He has obviously no title to the Madhubani *mutt* under the deed of *supardanama*, and the proper course for him to pursue is to get a suitable person appointed as the Mohunth of the Madhubani *mutt*. When such appointment has been made, it will be for the new Mohunth to bring an action against the defendants to eject them from the properties of the endowment.

As a last resort, the learned vakil for the plaintiff-respondent suggested that a conditional decree should be made in his favour, giving him possession of the properties to be retained by him till a Mohunth is duly installed. In support of this suggestion, reference was made to the case of *Sathappayyar v. Periasrami* (1). That case, however, is clearly distinguishable as it was treated in substance as a suit by the representative of the founder of a private endowment for removal of the Mohunth on the ground of misconduct and for administration of the trust properties. The scope of the present litigation is entirely different. The plaintiff here has not asked for declaration of his right to nominate a Mohunth for the Madhubani *mutt*. He has not in the plaint even stated precisely the nature of the relation between the two *mutts*. He has claimed title in himself on the basis of the *supardanama*, which clearly creates no valid title in him in the disputed properties. He cannot now be permitted to turn round and say that he is entitled to have a decree for administration, to recover possession of the disputed properties, and to keep such possession till a Mohunth has been appointed. As I have already explained, as soon as the last Mohunth of the Madhubani *mutt* died, steps ought to have been taken to get a suitable person installed as Mohunth, and I cannot appreciate upon what footing the plaintiff may be allowed to succeed on the assumption that at some future time a Mohunth may possibly be appointed. Besides, no such suggestion was made in the Court below, where it was argued on the contrary that the plaintiff was entitled to treat the Madhubani *mutt* as merged in the Patiala *mutt* by virtue of the *supardanama*. The result, therefore, in my opinion, is that this appeal must be allowed, the decree of the Subordinate Judge reversed, and the decree of dismissal made by the Court of first instance restored. Under the circumstances of the case, each party will bear his own costs of the litigation, in all the Courts.

A. T. M.

Appeal decreed.

CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

SRIMATI ATARMANI DASÍ

v.

THE CORPORATION OF CALCUTTA.*

Calcutta Municipal Act (III of 1899 B. C.) Secs. 406, 408, 409—Officers who should inspect bustee or submit report—General Committee, power of—Sub-Committee's power to sanction amendment of the original plan—Road, deflection of—Scheme to effect necessary improvement—Notice—Owners, duty of.

Under section 406 of the Calcutta Municipal Act, an inspection of the bustee in which the premises belonging to the petitioner are situate, was made and a standard plan was prepared on a report of a Medical Officer, an officer of the Corporation and an Engineer who was not an officer.

Held, that the plan was not bad in law. The section does not require that Engineer should be a permanent Municipal Officer.

Under section 408 of the Calcutta Municipal Act a notice was served upon all the owners of land of a bustee. One of the owners objected to a certain proposed road in the standard plan going in a certain direction, on which the Sub-committee decided that the road be deflected and the standard plan thus modified was approved by the General Committee. The petitioner was then served with a notice under section 408 to carry out the improvements according to the standard plan so modified, but was prosecuted for non-compliance.

Held, that the petitioner was not entitled to a fresh notice with regard to the deflection of the road in order to urge her objections to the deflection before the General Committee.

The law contemplates that all persons interested will be present before the Sub-committee and will present not merely their own objections to the scheme but also any objection which they may have to any modification of the scheme on the objections raised by others.

It is not impossible that the deflection of the road may be an improvement on the original plan, but that in itself is not sufficient under the law to invalidate the proceedings of the General Committee if the whole scheme was one calculated to effect a necessary improvement in the land covered by the bustee.

The Calcutta Municipal Act gives the General Committee full discretion to proceed either under section 406 or under section 409.

The Sub-committee has power under the Calcutta Municipal Act to sanction any amendment of the original plan even though it be merely to avoid expense and not for the purpose of improving the bustee.

Application for revision.

* Criminal Revision No. 811 of 1908, against the order of A. L. Mukerji, Esq., Municipal Magistrate of Calcutta dated the 17th July 1908.

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The facts material to the report briefly stated were as follows :—

The General Committee of the Calcutta Corporation defined the external limits of the *bustee* at 34 Corporation Street and took action under section 406 of the Calcutta Municipal Act. They caused the inspection of the *bustee* by two officers—the District Medical Officer and the Civil Engineer, who was not a permanent servant of the Municipality—who submitted a report (Ex. 4) along with a standard plan (Ex. 5). Notices were then issued on all the owners of the land of the *bustee* including Asmutennssa Bibi, the vendor of the petitioner. On objections by the petitioner's vendor and one Abdul Samad, her neighbour, a Sub-Committee decided that a certain proposed road in the original plan should be deflected so as to save the masonry buildings of Abdul Samad. The original plan with this modification was approved by the General Committee on the 29th July 1904 and a written notice under Section 408 was then served upon the petitioner's vendor, Asmutennssa Bibi. Asmutennssa was prosecuted for non-compliance but acquitted, as she had sold the *bustee* to the petitioner. The General Committee then caused a written notice under section 408 to be served upon the petitioner and she was prosecuted for non-compliance but acquitted on the ground that the standard plan, containing an unauthorised modification, was not the standard plan as approved by the General Committee. The mistake was rectified and the matter was placed before the General Committee and the issue of a fresh notice under section 408 upon the petitioner was ordered. A notice was then served upon her but she failed to comply with the requisition. Hence a prosecution was started against her.

The defence contended that the requisition in question was not lawful on the following grounds :—

(1) The plan was prepared so far back as 1904 ; so many years have gone by that the proper course would have been action under section 400 and not under section 406.

(2) Defendant's portion of the *bustee* is not overcrowded with huts and action under section 406 is not justifiable.

(3) The Engineer appointed under section 406 not being an officer of the Corporation, the report submitted by him and the Medical Officer of the Corporation is bad in law.

(4) The approved Standard plan (Exhibit 11) having been prepared in 1907 can not be said to have been prepared within

six months after the receipt of the report which is dated 2nd February 1904.

(5) The deflection of the road as ordered by the General Committee not being an improvement the approved Standard plan is opposed to the spirit of the law and should not be accepted by the Court.

The Municipal Magistrate of Calcutta overruled all the above objections, convicted the petitioner under sections 408 and 574 of the Calcutta Municipal Act and sentenced her to pay a fine of Rs. 25.

The petitioner then moved the High Court and a rule was issued on the Municipal Magistrate to show cause why the conviction and sentence should not be set aside on the ground that the objections of the petitioner were not heard before the modified plan was approved by the General Committee under the provisions of section 407 of the Municipal Act and generally that the conviction does not appear to be good in law.

Mr. Stokes (Counsel) and *Babu Manmatha Nath Mukerjee* for the Petitioner.

Mr. B. C. Mitter (Counsel) and *Babu Debenra Chandra Mullick* for the Opposite Party.

C. A. V.

The judgment of the Court was as follows :—

The rule in this case was obtained by the petitioner upon the Municipal Magistrate of Calcutta to show cause why the order convicting the petitioner under sections 408 and 574 of the Municipal Act and sentencing her to pay a fine of Rs. 25 should not be set aside on the ground that the objections of the petitioner were not heard before the modified plan was approved by the General Committee under the provisions of section 407 of the Municipal Act and generally that the conviction does not appear to be good in law.

The case in support of the rule has been very ably argued by the learned counsel, but after reading the explanation of the Municipal Magistrate and hearing the learned counsel in opposition to the rule, we hold that it is not a case for our interference and that the rule must be discharged.

It seems that under the provisions of section 406 of the Municipal Act, an inspection of the bustee in which the premises belonging to the present petitioner are situated, was made and a standard plan was prepared on a report of a Medical Officer and an Engineer. The Medical Officer was an officer of the Corporation, but the Engineer was not.

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It is argued in support of the rule that the Engineer ought also to have been a servant of the municipality. The contention does not appear to us to be sound. The terms of the section do not appear to us to be sound. The terms of the section do not require that that officer should be a permanent municipal officer and section 83 of the Act provides that a person appointed for a special purpose is a municipal servant. Notices were afterwards issued on all the owners of the land of the bustee including the vendor of the petitioners. Objections were made by the petitioner's vendor and also by her neighbour Abdul Samad. The latter's objection was that the proposed road passed through his masonry building. His objection with that of the petitioner's vendor and others were heard by the Sub-Committee on the 14th July 1904 and a decision was arrived at that the course of the road should be deflected so as to avoid the masonry buildings. The modification of the original plan was approved by the General Committees on the 29th July 1904.

It has been argued that a fresh notice should have been served on the owner of the house, the petitioner's vendor and her objection to the deflection of the road heard as it injuriously affected her property. There is nothing however in the law which requires the adoption of this procedure and apparently the law contemplates that all persons interested will be present before the Sub-Committee and will present not merely their own objections to the scheme but also any objection which they may have to any modification of the scheme on the objections raised by others. The deflection was no doubt made at the expense of the petitioner's vendor and it may have inflicted a serious hardship on her. But it seems to us that it was her duty at the time when the matter was before the Sub-Committee to have ascertained, what the various objections of other persons were and then to have opposed the objection which was made by Abdul Samad.

It has however been argued that the deflection of the road approved by the Sub-Committee was sanctioned merely to avoid expense and not for the purpose of improving the bustee and therefore it was not an act which the Committee were empowered to do under the Municipal Act. The Municipal Magistrate in dealing with this question seems to have been of opinion that the deflection of the road was not an improvement on the original plan, but he held that the Sub-Committee had power under the Act to sanction any amendment of the original plan and therefore

that it was not open to him in the case before him to hold that the action of the Sub-Committee was illegal. In our opinion the view taken by the Magistrate is correct.

The petitioner's vendor was served on the 1st December 1904 with a notice to carry out the improvements according to the revised plan. On the 15th March 1905, she sold the premises to the petitioner. Meanwhile, a prosecution for failure to obey the notice had been instituted against the petitioner's vendor and when that case came on for hearing on the 15th May 1905, it was dismissed on the ground that the vendor's interest in the premises had been sold to the petitioner. By an order of the General Committee a fresh notice under section 408 was then served upon the petitioner on the 7th September 1906 and in consequence of her failure to carry out the improvements, a prosecution against her was instituted in April 1907. On the 31st May 1907, she was acquitted on the ground that the plan according to which she had been directed to make the improvement did not correspond with the plan sanctioned by the General Committee after modification on the 29th July 1904.

It appears that some officer of the Municipality had on his own responsibility inserted in the plan a privy by the side of the road. The case again went back to the General Committee and by an order of that body the unauthorised addition to the plan was struck out and it was ordered that a fresh notice be issued to the petitioner to carry out the improvements to her premises in the bustee according to the original plan as passed by the General Committee on the 29th July 1904. The notice was served on her on the 26th September 1907 and on the 13th May 1908 she was convicted and sentenced to pay a fine of Rs. 25 for her failure to carry out the improvements as directed in the notice.

It has been argued in support of the Rule that in this case there was no real urgency for the improvements of the bustee and that the Municipal Committee ought not to have proceeded under section 406 of the Act but under section 409. It seems, however, to us that the law gives the General Committee full discretion to proceed under either of the two sections and there are no materials which would justify us in holding that there was on the part of the Commissioners any intention to evade the provisions of the law.

The petitioner has been rather unfortunate in having purchased the premises after the revised plan had been sanctioned and apparently without ascertaining that any change in the

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original plan had taken place. It is also not impossible that the deflection of the road may not be an improvement on the original plan, but that in itself is not sufficient under the law to invalidate the proceedings of the General Committee if the whole scheme was one calculated to effect a necessary improvement in the land covered by the bustee. The petitioner's case may be a hard case, but it is not in our power under the law to interfere.

The Rule is therefore discharged.

A. T. M.

Rule discharged.

APPELLATE CIVIL.

Before Sir Francis William Maclean, K.C. J. Esq., Chief Justice
and Mr. Justice Geidt.

ISMAIL KHAN MAHOMED

v.

NANI GOPAL MUKERJI,

ONE OF THE EXECUTORS TO THE ESTATE OF LATE

BABU AKHIL CHUNDER MUKERJI AND OTHERS.*

Ejectment, suit for—Onus of proof—Presumption—Permanency of holding—Confirmatory potta.

Where the plaintiff claims to eject the defendants from the land on the ground that they are merely tenants-at-will, the onus lies on the defendants to substantiate that they have a permanent interest in the land.

The absence of words importing the hereditary character of the tenure may be supplied by the evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son, where that hereditary character may be legally presumed.

Gopal Lal Thakoor v. Triluck Chunder Rai (1) and *Raja Satyasaran Ghosal v. Mohesh Chandra Mitter* (2) follow.[†]

In a case where the following facts were found, *viz.*, the possession at a uniform rent for some hundred years, the property descending from father to son, various transfers, many of them recognised by the landlord, the erection of *pucca* buildings, the improvements at much cost, and all this with the knowledge of the landlord's agents and no attempt to eject or to enhance the rent for all those years, the presumption of the permanency of the holding may legally be made.

A permanent tenancy is not destroyed by the acceptance by a purchaser of the holding of a mutation *potta* containing no express words importing the permanency of the holding.

The words "Mutation is being made in substitution of the heirs of Bhagwan" in the mutation *potta* mean, that the *potta* was executed not for the purpose of destroying the old permanent tenure and creating a tenancy-at-will, but simply with the object of effecting a mutation of names in the proprietor's *sherista*.

Where a mutation *potta* refers to an old *potta* creating a permanent holding, for the purpose of showing a proportionate rent and treats the taker as the then existing tenant and not creating him a new tenant by virtue of that *potta*, that *potta* is a confirmatory one.

Appeals by the Plaintiff.

Suits for possession after ejectment of the defendants.

The facts of the case and arguments appear sufficiently from the judgment.

* Appeals from Original Decrees Nos. 321 of 1900 and 322 of 1901, against the decrees of Babu Sashi Bhusan Chowdhury, Officiating Subordinate Judge, Second Court of 24-Perkanas, dated the 23rd July 1900.

(1) (1865) 10 M. I. A. 183 at 191; 3 W. R. P. C. 1 at 3.

(2) (1869) 2 B. L. R. P. C. 23 at 28; 12 M. I. A. 263 at 268; 11 W. R. P. C. 10 at 11.

[†] See also Robert Watson & Co Ld. v. Radha Nath Singh, (1905) 1 O. L. J. 572 at 576—Rep.]

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*Mr. O'Kinealy, Moulvi Syed Shamsul Fuda and Babu Charn
Chandra Ghose for the Appellant.**Babus Nilmadhub Bose and Umakali Mukerji, Dr. Asutosh
Mookerjee and Babus Joy Gopal Ghosha and Nilmani Mukerji
for the Respondents.*

C. A. V.

May, 29.

The judgment of the Court was delivered by

Maclean C. J.—These are two appeals from the decrees of the officiating Subordinate Judge of the Twenty-four Pergunnahs, and they relate, one to a parcel of land containing one biggah and seventeen cottahs, and the other to a parcel of land containing eight cottahs, in Kidderpore, which is a suburb of Calcutta. Both cases were heard together in the Court below, and, one judgment governs the two, and, the same procedure has been adopted before us.

The plaintiff claims, as an *ijaradar*, under the *Mutwalli* of the Hughli *Imambarah*, to eject the defendants from the lands I have mentioned, after notice to quit. The plaintiff says that the defendants are merely tenants-at-will whilst the defendants say that they are permanent tenants with heritable and transferable right in the lands, and, they are not liable to be ejected. If the defendants were only tenants-at-will, the sufficiency of the notice to quit has not been challenged. The real question in the suits is whether the defendants have a permanent interest in the lands and are permanent tenants or only tenants-at-will.

In the Court below it was urged that the property was *wakf* property, and, that, inasmuch as the lease under which the plaintiff held was an *ijara* lease for the years, renewable at the end of that period for twenty years, it was bad under Mahomedan law. We need not go into that : for, both sides are now agreed that it was not *wakf* property, but a trust property, having regard to the letter of the 24th of February 1876 from the Commissioner of Burdwan, and that the *Mutwalli* held it merely as a trustee. It has, however, been urged before us that, as such trustee, he had no power to grant the plaintiff such a lease as that under which the plaintiff now claims ; that such a lease is bad in law, and, that, consequently, the plaintiff has no title, and is not competent to maintain the present suit ; and, that the lease is void. We do not think, however, that we can properly go into such a case in the present suits, having regard to the view we take on the merits.

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Proceeding now to the merits, it is for the defendants to substantiate that they have a permanent interest in the lands, and they attempt to do so in this wise. It is not, we think, necessary to refer to the entry of the *jummadundi* of 1783, or to the subsequent *kobala*s by which Bhugwan Mundle acquired certain interests in the two biggahs and five cottahs of land, documents, however, which support the defendants' case: it is sufficient to refer to the *pottah* of the 8th of September 1813. Under that *pottah* the land in question in the two suits, namely, two biggahs and five cottahs, was leased to one Bhugwan Mundle at an aggregate rent of Rupees 9, annas 9 and 6 gundas; and, it has not been disputed by the plaintiff, that, having regard to the terms of that *pottah*, it created a permanent holding. In the Court below this *pottah* was attacked by the plaintiff as not being genuine. But the Court below held it to be genuine, and that finding has not been assailed before us. Bhugwan Mundle in whose favour this *pottah* was executed, was the head of the family, and, with his brother Bharat Mundle, was in joint possession of the property comprised in the *pottah* during their lives. They died. Bhugwan's share passed to his two widows Moni Dassi, and Bhoirobi Dassi, and Bharat's share to his widow Panchi Dassi. On the 15th of October 1835, these ladies sold eight cottahs of the land in dispute to one Mirtonjoy Safooi for Rs. 200 treating the property as comprised in a permanent holding. There is no reference in this *kobala* to the *pottah* of 1813, but the *kobala* contains these words: "Bringing the aforesaid land with *Amlah* (appurtenances) trees into your possession and use, acquiring title and getting the aforesaid land transferred from the name of the aforesaid husbands of us Moni Dassi, and Bhoirobi Dassi to your name in the *sherista* of the proprietor of the land, and paying year after year the rent of the aforesaid eight cottahs of land at the former usual rate, you and your sons, grandsons, &c. continue to enjoy and hold possession of the same with felicity." The words "getting the aforesaid land transferred from the name of the aforesaid husbands of us Moni Dassi and Bhoirobi Dassi to your name in the *sherista* of the proprietor of the land," appear to us to be important, having regard to what was done subsequently. On the 5th of November 1835 the landlord granted a *pottah*, and, Mirtonjoy executed a *kabuliyat* relating to these eight cottahs. On the 20th of October 1835, the widows sold the remainder of the land, (one biggah and seventeen cottahs), to one Ramdhone Sircar for Rs. 650 by a *kobala*, and, the terms of that *kobala* are

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substantially identical with those of the *kobala* to Mirtonjoy; and, on the 21st of October 1835, Ramdhone Sircar obtained a *pottah* of his land from the proprietor. The *kabuliyat*, relating to this one bigga and seventeen cottahs of land, which, in the ordinary course, would be with the plaintiff, has not been produced. It is important to notice that this *pottah* contains the words, "according to the old *pottah*," words which can only refer to the *pottah* of 1813. On the 29th of May 1838, Ramdhone Sircar sold his one bigga and seventeen cottahs of land for 375 Rupees to Ram Coomar Mondal and Jadub Mondal, and in or about January 1839 a *pottah* and a *kabuliyat* in relation to this land were interchanged. It is not necessary to trace the subsequent title. Both plots of land have been dealt with in various ways from 1838 down to the date of this suit by transfer or otherwise, and both plots of land now belong to the defendants. The same rent has been paid for the land since 1813, and, substantial brick buildings have been erected upon it, and tanks filled up.

The contention of the plaintiff is that the defendants cannot go behind the *pottahs* of October 1835 and 1839, and, that upon the construction of those documents, a mere tenancy-at-will was created.

The defendants say that those documents were executed not with the object of determining the permanent holding which was created under the *pottah* of 1813, and which was dealt with by the widows in their sales as a permanent holding, but that they were only executed for the purpose of effecting a mutation of names in the *scribta* of the landlord, that they were merely confirmatory *pottahs*, and that, at any rate, in the *pottah* of the 21st October 1835, there was a recognition of the old *pottah* of 1813, and in short that they were *kharija pottahs*, that is *pottahs* of mutation. It is highly improbable, seeing that when Ramdhone and Mirtonjoy purchased from the widows, the holding was certainly a permanent one, and they paid for their purchase upon the footing of its being a permanent one, that they should at once have abandoned it and accepted a lease from the landlord upon the footing of its being a mere tenancy-at-will. This is very improbable.

It is unfortunate that the *istafas* which are referred to in the *pottahs* of 1835 have not been produced. If in existence, they would in the ordinary course have been in the custody of the plaintiff and producible by him. He has not produced them. In the *pottah* of the 21st of October 1835 there is a reference

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to the old *pottah* which as we have pointed out, can only mean the *pottah* of 1813, and, that old *pottah* is apparently referred to for the purpose of showing that the proportionate rent was of 1 bigha and 17 cottahs, having regard to the aggregate rent reserved by the *pottah* of 1813. It is noticeable that this document treats Ramdhone Sircar as the then existing tenant, and not as creating him a new tenant by virtue of that *pottah*. The reference to the old *pottah* seems to us to be a recognition of the existence of the old rights: and that this *pottah* was really a confirmatory *pottah*, in fact, a *khariji pottah*. The words in it, which according to the learned Subordinate Judge who is competent to translate it accurately, mean, "mutation is being made in substitution of the heirs of Bhagwan Mundol" appear to point strongly to this, that the *pottah* was executed not for the purpose of destroying the old permanent tenure and creating a tenancy at will, but simply with the object of effecting a mutation of names in the proprietor's *sherista*: and, we think this is the true effect of the document.

The same observations apply to the *pottah* of the 5th of November 1835, although in that *pottah* there is no reference to the old lease. But there is a reference to Mirtunjoy's previous purchase from the widows of the Monduls, which would be out of place if this document were intended to be the creation of a new tenancy, rather than confirmatory of the old permanent one. And this reference would tend to show that the *zemindar* was then aware of the conveyances, which dealt with the holdings as permanent and heritable. Confirmatory *pottahs* are common in India *Ram v. Jughes* (1). The *kabuliyat* executed by Mirtunjoy on the same date does not appear to us to conflict with this view.

The same observations appear to us to apply to the *pottah* of the 29th of May 1838, (*sic*) consequent upon the sale by Ramdhone Sircar of the 1 bigha and 17 cottahs to Ramkumar Mondul and Jadab Mondul and we need not repeat them. It is conceded on both sides that the 7½ cottahs also referred to in that *pottah* were not connected with the land now in suit, nor, is it shown what the tenure of those lands was or what they were. It is said that the words in that *pottah*, "if the rate of the *mehal* be enhanced you shall pay rent at that rate," are inconsistent with the view that this was a mere *khariji pottah*, and are inconsistent with the terms of the permanent *pottah* of 1813. After this lapse of time, and, in the absence of any explanation, it is perhaps not very

(1) (1873) 12 B. L. R. 229 at 236.

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easy to say to what those words refer : but there is perhaps some force in the suggestion that they may be taken to refer to the 7½ cottahs which are referred to in that *pottah*, and have nothing to do with land the subject-matter of the present suit. The kabuliyat given by the Monduls does not appear to us to be inconsistent with the construction which we put upon the *pottah* to which we last referred.

In our opinion, then, these *pottahs* were merely mutation *pottahs*, and were, in effect, confirmatory of the *pottah* of 1813, and not destructive of it, in the sense of converting the permanent tenure created by that *pottah* into a tenancy-at-will, as the plaintiff contends, was their purport and effect. As we pointed out, it is highly improbable that the purchasers who purchased, for substantial prices, land undoubtedly held as a permanent tenure, would have consented to change that into a tenancy-at-will and, the attitude of both parties for sixty years, that is, since 1835, has been perfectly consistent with this view. The landlord has not for nearly 100 years raised or tried to raise the rent, although the value of the land in question during that period has gone up by leaps and bounds : whilst, the tenants filled up tanks and built expensive pucca buildings on the land, and have throughout acted as if they held it as a permanent tenure, and not tenants-at-will. It is difficult to believe that this dealing with the property by the tenants could, during this long period, have escaped the attention and knowledge of the landlord. It is unfortunate, we repeat, that the *istafas* have not been produced. If they had been in the form of Exhibit A.A.C., they would have strongly supported the defendant's case.

But, assuming that our view as to the *pottahs* is wrong, and that they were not confirmatory *pottahs*, it would appear from such cases as *Babu Gopal Lall Thakoor v. Teluck Chunder Rai* (1) and *Raja Satyasaran Ghosal v. Mohesh Chandra Mitter* (2), that, in the absence of words importing it, the hereditary character of the tenure may be supplied by the evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son, whence the hereditary character may be legally presumed. Upon the facts found in this case by the lower Court, *viz.* the possession at a uniform rent for some 100 years, the property descending from father to son, various transfers, many of them recognised by the landlord, the erection of pucca buildings, the improvements at much cost, and all this

(1) (1866) 10 M. L. A. 183 at 191.

(2) (1869) 2 B. L. R. P. C. 23 at 28.

with the knowledge of the landlord's agents and no attempt to object or to enhance the rent for all these years, findings which have not been challenged on the appeal before us, the presumption of the permanency of the holding may legally be made.

The appeals fail and must be dismissed with costs.

A. T. M.

Appeals dismissed.

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Ismael Khan
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Nani Gopal Mukerji,

Maoleen, C. J.

Before Mr. Justice Rampini and Mr. Justice Mookerjee.

SASI BHUSAN RUDRA

v.

BENI MADHAB SAMANTA.*

*Bengal Tenancy Act (VIII of 1885), Sec. 153—Second Appeal—Rent,
suit for.*

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1908.

March, 27.

In a suit for rent, the defendant pleaded that the plaintiff was not, during the whole of the period for which the rent was claimed, the owner of all the lands included in the tenancy, as his interest in a portion had been sold at a sale under the Public Demands Recovery Act :

Held, that a decision of the question thus raised was a question relating to the amount of rent annually payable, and an appeal lay against the decree under Sec. 153 of the Bengal Tenancy Act

Nobin Chand v. Banenath (1) followed.

Appeal by the Plaintiff.

Suit for rent.

The facts of the case appear from the judgment.

Babu Amarendra Nath Bose for the Appellant.

Babu Bepin Behary Ghosh for the Respondent.

* The judgment of the Court was delivered by

Rampini J.—This is an appeal against the decision of the Subordinate Judge of Hooghly dated the 23rd December 1904.

The suit out of which this appeal arises is one for arrears of rent. The defence was that the plaintiff's right to some of the plots had been sold at auction in the execution of a certificate issued against him for arrears of cesses and that as such he was not entitled to recover rent of the entire holding.

The Munsiff overruled the plea and decreed the plaintiff's claim in full. The Subordinate Judge gave effect to the defendant's plea and dismissed the suit. The plaintiff now appeals to this Court.

* Appeal from Appellate Decree No. 488 of 1905, against the decree of Babu Dina Nath Sarkar, Subordinate Judge, Hooghly, dated the 23rd December 1904, reversing that of Babu Barada Prasad Roy, Munsiff, Arambagh, dated the 11th March 1904.

(1) (1894) I. L. R. 21 Cal. 722.

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1893.

Smt Bhusan Rudra

Beni Madhab

Samanta.

Rampini, J.

A preliminary objection has been taken, namely, that as this is a suit for rent and as the amount of rent is below Rs. 100, therefore no second appeal lies. We think that on the authority of *Nobin Chand Nuskar v. Bahsenath Paramanick* (1), the facts of which case are somewhat similar to those of the present one, a second appeal lies. We, therefore, proceed to discuss the case on the merits.

Now, the Subordinate Judge has found as a matter of fact, that the plaintiff's right to some of the plots was sold at auction in execution of a certificate. The sale certificate was taken out on the 11th October 1901 which corresponds to sometime in 1308. That being so, it is clear that the suit for a period subsequent to the date of the confirmation of sale must fail, because the plaintiff is not entitled to the whole of the rent he claimed after that date, nor can the amount of rent to which he is entitled be apportioned as he has not made the auction purchaser either a plaintiff or a defendant. He alone is not entitled to that which he lays claim to. The learned pleader for the plaintiff contends that under the provisions of Section 150, the defence should have been struck out. But we do not think that this a case in which the defendant has ever admitted that any money was due to the plaintiff. It is further urged that as the sale took place in 1308 and as the plaintiff has sued for rent of the year 1307, he is at all events entitled to rent for that year though he may not be entitled to rents for subsequent years. We think that we must give effect to this contention. There is no question that the plaintiff is entitled to rent for the year 1307. The defendant's pleader admits that the plaintiff is entitled to this amount and he is willing to give him the same.

We, therefore, decree the appeal for rent of the year 1307 only, namely Rs. 19 as. 15, gds. 15, but in other respects the appeal is dismissed. Costs in proportion.

The plaintiff is entitled to Rs. 19, as. 15, gds. 15 with interest at the rate of 12 per cent. per annum.

B. M.

Appeal decreed.

(1) (1894) 1 L. R. 21 Calc. 722.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

NARSINGH NARAIN SINGH

v.
HARKHU SINGH.*

CIVIL.

1907.

May, 9.

*Civil Procedure Code, if exhaustive,—Judgment, loss of :—Re-writing judgment—
Partition suit, lots—Drawing lots—Lots, drawing of.*

Where a judgment has been lost, it is open to the Judge to re-write from memory the substance of it. It cannot be expected that the Civil Procedure Code would provide for such a contingency.

Semle : A Judge, in making allotments in a partition suit, should not draw lots in the manner provided by section 72 of the Estates Partition Act (V of 1897), but should follow the procedure laid down in section 396 of the Civil Procedure Code and make the allotment of the shares after a full consideration of the rights and objections of different parties.

Appeal by some of the Defendants.

Suit for partition.

The material facts and arguments appear from the judgment, *Babus Umakali Mukerji, Raghunath Singh and Ganesh Dutt Singh* for the Appellants.

Moulvie Syed Mohamed Tahir, Babus Chandra Sekhar Frosad Singh and Bishun Prasad for the Respondents.

The judgment of the Court was delivered by

Brett J.—The present appeal arises out of a suit brought by the plaintiff for partition of mouza Ghosanda *alias* Barahganwa.

The partition was made between the plaintiff and twenty persons who were made defendants in the suit. The Court under section 396, Civil Procedure Code, appointed a Commissioner to make the partition according to the rights of the parties, and the Commissioner submitted a report dividing the mouza into eight different *takhtas* and proposing that they should be allotted between the plaintiff and the different defendants in the manner stated in the report. According to the proposed allotment the plaintiff and defendants 10 and 11 were to get a *takta* described as Khetian No. I, defendants 12 and 13 were to get plots of Khetian Nos. VII, and defendants 14 to 17 were to get plots of Khetian No. VIII. We have in this appeal only to deal with the *takhtas* allotted to these three sets of co-sharers. The share of each of these sets amounted to 1 anna 12 gundas, and when the

* Appeal from Original Decree No 348 of 1905 against the decision of Babu Gopal Chandra Banerji, Subordinate Judge, Patna, dated the 27th May 1905.

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Brett, J.

report of the Commissioner was submitted to the Judge, the defendant No. 1 objected to the share which had been allotted to him. The result of his objection was that the Judge directed that the allotment of his share and of the shares of the defendants 12 and 13, 14, 15, 16 and 17 should be made by drawing lots. On the lots being drawn, defendant No. 1 obtained the share which had been allotted to him but defendants 12 and 13 obtained the share which had been allotted to defendants 14, 15, 16 and 17 and *vice versa*.

The defendants Nos. 14, 15, 16 and 17 have appealed and in support of their appeal it is contended that the Judge of the lower Court was not justified in law in interfering with the allotment made by the Commissioner and that there is no provision in the Code of Civil Procedure or in any other Act applicable to Civil Courts which permits of the allotment of shares by drawing lots in a partition made by a Civil Court.

On behalf of the opposite party it is contended that under the provisions of section 72 of the Estates Partition Act (V of 1897) it is allowed to Revenue authorities to make the allotment by the drawing of lots and there is nothing to show that the Civil Procedure Code is exhaustive in dealing with the question of partition and that therefore the Judge was justified in adopting the procedure he followed.

Unfortunately the judgment in which the Judge recorded his reasons for allotting the shares by lot is lost and he was under the impression that he could not re-write it, or, at any rate, under the circumstances that there was no provision of the law empowering him to do so. We cannot agree with the Judge that it is to be expected that the Civil Procedure Code should contain special provisions to meet a contingency such as the loss of a judgment. In such an event it was certainly open to him after his judgment has been lost to re-write from memory the substance of it. In the present instance, as it is, we do not find on the record any statement of the reasons which induced the Judge to arrive at the conclusion that in this case it was proper to allot the shares to these three sets of co-sharers by the drawing of lots. Further we find that when the Commissioner sent in his report, defendants 12 and 13 and the other set of defendants 14, 15, 16 and 17 raised no objection to the allotment made by him, and it seems that the defendants 12 and 13 objected to the proposal to allot the shares by the drawing of lots.

It is now suggested on behalf of defendants 12 and 13 that

they raised that objection because they thought that the share which had been allotted to defendant No. 1 might possibly fall to them and that they all along wished to obtain the share which was allotted by the Commissioner to defendants 14, 15, 16 and 17. We cannot accept this as a sufficient explanation of their objection to the drawing of lots and we think under the special circumstances that as the objection had been raised, the Judge had not sufficient reason for insisting on the drawing of lots instead of following the provisions of section 306 and making the allotment of the shares after a full consideration of the rights and objections of different parties.

We think under the circumstances that, as the share which was originally allotted to defendant No. 1 has fallen to them and no objection has been raised, the proper order for us to pass in the present case is to set aside so much of the judgment and decree of the lower Court as awards Khatian No. VIII to defendants 12 and 13, and Khatian No. VII to defendants 14 to 17 and in lieu thereof to restore the allotments made by the Commissioner. Defendants Nos. 12 and 13 will get the plots of Khatian No. VII and defendants 14 to 17 will get the plots of Khatian No. VIII.

The appellant will get the costs of the paper-book from defendants 12 and 13.

We assess the hearing fee at Rupees fifty.

We make no order for defendant No. 1.

N. K. B.

Appeal allowed.

Before Mr. Justice Mitra and Mr. Justice Geidt.

RATANMANI DEBI

v.

DINA NATH CHATTERJEE.

Land Registration Act (VII of 1870 B. C.) Sections 3 (10), 78—Revenue-free property—Resumption under Regulation XXXVII of 1793.

The mere fact that the area of the land is over 100 bighas and that it was capable of being resumed by Government under Regulation XXXVII of 1793 is not sufficient to make it revenue-free property within the meaning of section 78 of the Land Registration Act

Appeal by the Plaintiff.

Suit for rent.

* Appeal from Appellate Decree No. 2326 of 1902 against the decree of Babu Bhagabati Charan Mitra, Subordinate Judge, 2nd Court of 24 Parganas dated the 18th June 1902, reversing that of Babu Prosunno Kumar Bose, Additional Munsiff of Barasat, dated the 23rd February 1901.

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Harkhu Singh.

Brett, J.

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1908.

February, 21.

CIVIL,

1906.

Ratanmani Debi

v.
Dina Nath Chatterjee.

The facts of the case and arguments appear sufficiently from the judgment.

Babu Jadu Nath Kanjilal for the Appellant.

Babus Shibaprasanna Bhattacharjee and Jatindra Mohan Sen Gupta for the Respondent.

The judgment of the Court was as follows :

This is an appeal on behalf of the plaintiff who instituted a suit for rent against the defendant in the Court of the Munsiff of Barasat. The suit has been dismissed by the Subordinate Judge of the 24-Parganahs on the ground that the plaintiff was bound to have her name registered under Act VII (B.C.) of 1876. The area of the land covered by the lease to the defendant is over 100 bighas. There is however nothing to show that it is "revenue-free property" within the definition of the words of section 3 sub-section 10 of the Act. The property may be "rent-free property" within the meaning of section 33 of the Act and may be land included within the estate in which the land is situate.

It has not been shown that though the area of the land is over 100 bighas, proceedings under Regulation II of 1819 and Regulation III of 1828 were ever taken for resumption.

Section 78 of the Act bars a suit for rent by a person claiming such rent as proprietor or manager of a revenue-free property in respect of which he is required by the Act to cause his name to be registered. The plea of the defendant to be successful must rest on a finding that the property is revenue-free property of which registration is compulsory. The mere fact that the area of the land is over 100 bighas and that it was capable of being resumed by Government under Regulation 37 of 1793, is not sufficient to make it revenue-free property within the meaning of the Act.

We therefore think that the decision of the lower Appellate Court is erroneous, and as there is no other plea raised by the defendant which requires adjudication, we decree the appeal and direct that the decision of the Munsiff be restored.

The appellant is entitled to her costs in all the Courts.

A. T. N.

Appeal decreed.

Before Mr. Justice Mookerjee and Mr. Justice Caspersa.

MOHANUND SAHAY AND OTHERS

v.
SAIDUNNESSA BIBI.*

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August, 5, 14.

Bengal Cess Act (IX of 1880 B. C.), Sec. 41—Perpetual mokarari lease, construction of—Bilmokhta—Statutory liability—Extraneous evidence—Evidence Act, (I of 1872) Sec. 92.

It is open to the zemindar and the tenure-holder to contract themselves out of the provisions of section 41 of the Bengal Cess Act.

Surnomoyee v. Puresh Narain (1), *Shumbhu Nath v. Hurro Sundari* (2), *Ashutosh Dhar v. Amir Mollah* (3) and *Narendra Kumar v. Gora Chand* (4) referred to.

The word 'Bilmokhta' means, according to agreement, stipulated, fixed, or consolidated.

Under a perpetual mokarari lease a tenure-holder stipulated to pay Rs 1,585 as the total amount of rent inclusive of abwabs and cesses during the whole period of the continuance of the tenancy. It contained the following word "*geh Sab Samil uni pundrah sao panchasi rupai men hai 'bilmokhta' :*"

Held, that the tenant undertook to pay the whole of the cesses which were levied at the time of contract, inclusive of the share payable by him under the statute as also the share the burden of which would otherwise have to be borne by the landlord himself. If any additional cess is imposed or if the amount of cess is increased, the incidence of the new burden is regulated according to the statute.

When an exemption is claimed from statutory liability, the contract under which exemption is claimed, must be strictly construed against the claimant and it must appear from its terms, beyond the possibility of any dispute, that the parties intended to vary the liability as imposed by the statute. The rule is specially applicable where exemption is claimed from exaction imposed by the State.

The construction to be placed on a deed ought to be such as will render it reasonable rather than unreasonable and will make it just to both the parties rather than unjust to one of them.

Atwood v. Emery (5) and *Rawlinson v. Clarke* (6) referred to.

In the construction of contracts, Courts may look not only to the language employed but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made; but this may be done only with a view to interpret the contract and not to contradict it.

Ingles v. Buttery (7) and *Macdonald v. Longbottom* (8) referred to.

* Appeal from Appellate Decree No. 2426 of 1905, against the decision of W. Cook Esq., District Judge of Gya, dated the 19th September 1905, reversing the decision of Moulvi Mirza Bedar Buksh, Munsiff of Aurangabad, dated the 30th May 1905.

(1) (1878) 1 L. R. 4 Calc. 576

(2) (1882) 11 C. L. R. 140.

(3) (1900) 3 C. L. J. 337.

(4) (1906) 3 C. L. J. 391, 1 L. R. 33 Calc. 683.

(5) (1856) 1 C. B. N. 8. 110.

(6) (1845) 14 M. & W. 187.

(7) (1878) 3 App. Cas. 552 (576).

(8) (1859) 1 El. & El. 977.

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1907.

Mohanund Sahay
v.
Saidunnessa Bibi.

Appeal by the Plaintiffs.

Suit to recover excess cess.

The facts of the case and arguments appear sufficiently from the judgment.

Mr. O'Kinealy (Advocate-General) and Babus Umakali Mukerji, Raghu Nundun Prosad and Raghu Nath Singh for the Appellants.

Babu Nilmadhub Bose, Moulvi Mahammad Yusuf, Babus Dwarka Nath Chakerbutty and Akhoy Kumar Banerji and Moulvis Syed Shamsul Huda and Mahammad Mustafa Khan for the Respondent.

C. A. V.

The judgment of the Court was delivered by

August, 14.

Mookerjee J.—The circumstances which gave rise to the litigation out of which the present appeal arises may be shortly stated as follows : On the 26th September 1881, the defendant respondent took a perpetual mokarari lease of the entire mouza Zakhim Salempore from the plaintiffs appellants. A sum of Rs. 6,340 was paid as bonus and the rent payable was fixed under the lease by a clause which runs thus : "At varying jamas, to wit, on an annual uniform jama of Rs. 1,580 from 1289 to 1291 (fasli) and at an annual uniform consolidated jama of Rs. 1,585 of the current coin from 1292 (fusli) together with abwab, such as, selami for Dusserah and Holi Purkha, sair, Roadcess, Public Works Cess etc., all of which are included in that very sum of Rs. 1,585." This is the covenant as embodied in the kabulyat which was produced in the Courts below. In this Court, a certified copy of the lease was allowed to be produced and an examination of it shows that the corresponding covenant in that document is expressed in identical language.

At the time when the lease was granted, the amount of cesses levied by Government from the zemindar was Rs. 97. Since then, as the annual value of the land has gradually increased, there has been a corresponding increase in the demand of the State. In 1889, the cesses were levied from the zemindar at the rate of Rs. 108-1-1 per year and in 1902 the amount was increased to Rs. 174-4-3. The plaintiffs appellants commenced the present action for declaration that they were entitled to recover from the tenure-holder defendant the amount of cesses in excess of Rs. 97 which they had been called upon to pay by the Government and also for recovery of the sums paid.

The claim was resisted by the defendant on the ground that the amount payable by her in respect of this tenancy had been unalterably fixed by the terms of the contract of the 26th September 1881 and that the burden of all new impositions by the State must be borne by the plaintiffs zemindars. The Court of first instance overruled this objection and made a decree in favour of the plaintiffs. Upon appeal, the District Judge has reversed that decision.

The plaintiffs have now appealed to this Court, and, on their behalf it has been contended that, upon a true construction of the lease of 1881, the defendant is liable to bear the burden of the increase in the amount of cesses payable. Whether this contention is valid or not, must depend upon the terms of the contract between the parties. But before we consider the question of the true construction of the lease of 1881, it is desirable to point out that it was open to the zemindar and the tenure-holder to contract themselves out of the provisions of section 41 of the Bengal Cess Act of 1880, (see *Surnomoyee v. Faresh Narain* (1), *Sumbhu Nath v. Hurro Sundari* (2), *Ashutosh Dhar v. Amir Molla* (3) and *Narendra Kumar Ghose v. Gora Chand Fotedar* (4)). The question, therefore, reduces itself to this, to what extent have the parties contracted themselves out of the provisions of section 41 of the Cess Act, because to that extent only will their rights and liabilities be governed by the contract and beyond that, the statute must prevail.

The lease is described as a perpetual mokarari lease which implies that the tenancy was permanent, heritable and transferable and that the rent was fixed in perpetuity. From this, it was argued on behalf of the defendant respondent, that the sum of Rs. 1,585 was the only sum payable by the tenant to the landlord during the whole period of the continuance of the tenancy. It was pointed out that the lease describes this sum as the uniform annual jama which includes abwabs of various descriptions and Road Cess and Public Works Cess, and it was contended that this implied that whatever might be the amount levied by the Government from time to time as Road Cess and Public Works Cess, the tenant could not be called upon to pay anything more than Rs. 1,585 annually; in other words, it was argued that the effect of the agreement between the parties was that the tenant should take

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(1) (1878) 1 L. R. 4 Calc. 576

(2) (1882) 11 C. L. R. 140.

(3) (1900) 3 C. L. J. 337.

(4) (1906) 3 C. L. J. 391; 1 L. R. 33 Calc. 663.

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upon herself to pay the whole of the cesses payable at the time of the contract and that if the amount payable was subsequently increased, the burden of the excess should fall upon the landlord.

After a careful examination of the terms of the contract, we are clearly of opinion that the contract did not provide that if the cesses were increased in future, the additional burden should fall upon the landlord. The only reasonable interpretation of which the contract in question is capable, is that the amount annually payable by the tenant, namely Rs. 1,585, included abwabs, Road-cess and Public-works cess. No doubt it was a consolidated amount, but the contract does not provide for the contingency which has happened, namely, an increase in the amount of cesses levied by the State. Much stress was laid on behalf of the respondent upon the words—“*Yeh sab shamil usi pundrah sao panchasi rupea men hai bil mokhatta*,” and it was suggested that this means that Rs. 1,585 was the only amount which could, however, the circumstances might alter, be legitimately demanded by the landlord from the tenant. In our opinion, there is no foundation for the interpretation suggested. The word *bil mokhatta* is well-known; it means “according to agreements, stipulated fixed or consolidated.” In Wilson’s Glossary p. 87, a ‘*bil mokta jama*’ is stated to mean ‘stipulated assessment’ and a ‘*bil mokta pattah*’ is stated to mean a lease for a gross aggregate rent, one in which the land taxes and other cesses or *abwabs* are consolidated. The position of the word *bil mokhatta* in the sentence in the lease before us, might even justify a literal translation—“according to agreement” (that is, the lease), instead of the derivative rendering “consolidated,” and this interpretation considerably weakens the contention for the defendant respondent.

The clause in question in the lease now before us, seems therefore, to imply nothing more than this, that Rs. 1,585 was the total amount inclusive of abwabs and cesses. There is nothing to show that the parties contemplated a possible increase in the amount of cesses leviable by Government and they do not appear to have provided for this particular contingency. If so, the obvious result is, that the rights and liabilities of the parties must be regulated by the statute, only except in so far as the contract has made provision to the contrary. How far, then, has the contract in this case made express provision contrary to the statute. In our opinion, the effect of the contract is that the tenant undertakes to pay the whole of the cesses which were levied at that time, inclusive of the share payable by her under

the statute as also the share the burden of which would otherwise have to be borne by the landlord himself. If any additional cess is imposed or if the amount of cess is increased, the incidence of the new burden must be regulated according to the statute.

In support of the interpretation which we put upon the contract, reliance may be placed upon two well established principles. In the first place, it is indisputable that when an exemption is claimed from statutory liability, the contract under which exemption is claimed, must be strictly construed against the claimant, and it must appear from its terms, beyond the possibility of any dispute, that the parties intended to vary the liability as imposed by the statute. This rule is specially applicable where exemption is claimed from taxation imposed by the State. No doubt, in this particular instance, it was open to the parties to contract themselves out of the provisions of the statute. But it must be clearly and satisfactorily established not only that the parties did intend that their liability should be different from that created by the statute, but also, that they intended the variation to go to the extent now suggested on behalf of the respondent. In the second place, it is well-established that the construction to be placed on a deed ought to be such as will render it reasonable rather than unreasonable and will make it just to both the parties rather than unjust to one of them. [See *Atwood v. Emery* (1) and *Rawlinson v. Clarke* (2).] In other words, as stated by Phillips J. in *McElroy v. Swope* (3), a Court should always prefer that construction, consistent with the language of the deed, which will prevent one of the parties from obtaining an unconscionable advantage over the other.

Now, in the case before us, if the contention of the respondent prevails, what is the obvious result? Under the Bengal Cess, Act, the amount of cesses payable is assessed upon the annual value of the land, which means the total rent actually payable or assessed as reasonably payable, during the year, by all the cultivating raiyats of the land: consequently as the total amount of rent payable increases, there must be a corresponding increase in the amount of cess leviable. It follows, accordingly, that the greater the diligence and success of the defendant in the enhancement of rent payable by the cultivating raiyats, the larger will be the amount of cesses demandable by the State. The conten-

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(1) (1856) 1 C. B. N. S. 110.

(2) (1845) 14 M. & W. 187.

(3) (1891) 47 Federal Reporter 390.

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tion of the respondent, therefore, amounts to this that the greater the profit she makes by increasing the rent payable by her tenants, the greater will be the additional burden thrown upon the landlord; and, it is quite conceivable that if in course of time, the annual value of the land, that is the annual profits of the defendant, continuously increases, the increase in cesses might reach a figure which would absorb the whole of the rent receivable by the plaintiffs. If the contract between the parties had expressly stated that their relative position was to be of this description, a Court might feel itself compelled to enforce the terms of the agreement. But when the lease does not expressly make a provision to this effect, and when a different interpretation is possible and is consistent with the language of the deed, we must decline to accept the construction suggested on behalf of the respondent, the result of which would be manifest injustice to one of the contracting parties. We must adhere to the just rule of interpretation that the words of a contract should be given a reasonable construction, where that is possible, rather than an unreasonable one, and we must endeavour to give a construction most equitable to the parties, which will not give one of them an unfair or unreasonable advantage over the other, *Clay v. Ballard* (1). We feel no doubt whatever, that the interpretation which the respondent now puts on her contract is an after-thought, and is not the interpretation put upon it by the parties when it was executed.

The learned vakil for the respondent suggested that at the time when the lease was granted, it was executed by way of a compromise of a dispute, and that there was an agreement between the parties, that future alteration in the cesses should in no way disturb the jama mentioned in the lease. In support of this view, he cited the eighth paragraph of the written statement. It is obvious however, that this can be of no assistance to the respondent. It cannot be disputed that under the Indian Evidence Act, no evidence of extrinsic circumstances is admissible to add to, contradict, vary or alter the terms of a deed, and as was observed by Lord Denman C. J. in *Goss v. Lord Nugent* (2), "if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given on what passed between the parties either before the written instrument was made or during the time that it was in a state of preparation,

(1) (1844) 9 Robinson, 308; 41 Am. Dec. 328.

(2) (1833) 5 B & Ad. 58 at 64.

so as to add to, or subtract from, or in any manner to vary or qualify the written contract." If evidence of negotiations was admissible to contradict the terms of the written contract, the very object which the parties had in view in reducing the terms of the agreement into writing would be completely defeated. No doubt, as stated in *Meriami v. United States* (1), it is a fundamental rule that in the construction of contracts, Courts may look not only to the language employed but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made; but this may be done with a view to interpret the contract and not to contradict it, *Inglis v. Buttery* (2), and *Macdonald v. Longbottom* (3). In the case before us, if we advert to the subject matter of the lease and the surrounding circumstances at the time of its execution, it is clear that the parties did not intend and could not very well reasonably have intended that the burden of all additional impositions should be borne by the landlord, specially if this imposition was due to an event the entire profit of which would be enjoyed by the tenant. We must consequently hold that, so far as the additional amount of cesses is concerned, the rights of the parties must be regulated by the statute.

The question next arises as to the amount which may be legitimately claimed by the plaintiffs from the defendant. The effect of the contract was, as we have already stated, that the tenant undertook to pay to the landlord not only what was, at the time, legitimately demandable from her as tenure-holder under section 41 of the Bengal Cess Act, but also the amount the burden of which would otherwise have to be borne by the landlord as zemindar. If we examine the provisions of section 41 of the Bengal Cess Act, we find their ultimate effect to be this. The Cess is calculated upon the annual value at a certain rate, which in the present case, is one anna in the rupee. The zemindar, in the first instance, pays to the Government the amount assessed, that is, $\frac{1}{8}$ of the annual value, subject to a deduction proportionate to the Government revenue, which turns out to be $\frac{1}{2}$ of the revenue. But the zemindar collects from the tenure-holder $\frac{1}{8}$ of the annual value subject to a deduction of $\frac{1}{2}$ of the rent paid and the tenure-holder in his turn collects from the cultivating raiyats $\frac{1}{2}$ of the annual value. The nett

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(1) (1883) 107 U. S. 437.

(2) (1878) 3 App. Cas. 552 (576.)

(3) (1859) 1 El. and El. 977.

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result of this operation is that if the total amount of cesses be taken to be $\frac{1}{8}$ of the annual value, the Government bears $\frac{3}{8}$ of the revenue; the zemindar bears $\frac{3}{8}$ of the difference between the rent he collects from the tenure-holder and the revenue he pays to Government; the tenure-holder bears $\frac{1}{8}$ of the difference between the rent he collects from the cultivating raiyats and the rent he himself pays to the zemindar; and the cultivating raiyat bears $\frac{1}{8}$ of the rent he pays to the tenure-holder. It is obvious, therefore, that if the rent payable by the tenure-holder to the zemindar is, as in this case, constant, the amount of cesses which the zemindar has ultimately to bear is a constant quantity, and it is this amount which under the contract in this particular case the tenant herself undertook to bear. The tenant also undertook to pay the amount then payable by her under the statute which would vary with the annual value. As the annual value has now increased, it is this item alone which has increased and the whole of the increase has to be paid by the tenant. It has been found that the amount of cesses payable at the date of the contract was Rs. 97, and this was included in the consolidated sum of Rs. 1,585. The amount of cesses now payable is Rs. 174-4-3. The difference, therefore, namely Rs. 77-4-3 which has been levied by the Government from the zemindar, is payable by the defendant tenure-holder, and this is the rate at which the claim is laid in the plaint, although the calculations by which this amount is determined are not very intelligible. The plaintiffs, further, claimed damages at the rate of 25 per cent. The Court of first instance, however allowed damages at 12 per cent. only which seems to us to be fair. It is clear, therefore, that the total amount which was decreed by the Court of first instance is legitimately recoverable by the plaintiffs from the defendant.

The result is that this appeal must be allowed, the decree of the District Judge reversed and that of the Court of first instance restored. This order will carry costs throughout.

A. T. M.

Appeal allowed.

Before Mr. Justice Rampini and Mr. Justice Caspersz.

H. B. DALGILISH

v.
DAMODAR NARAIN CHOWDHURY AND OTHERS.*

Ejectment, suit for—Tenant, holding over after expiration of leases—Indigo factory—Cultivating raiyat—Notice to quit, if necessary—Factory zeraif—Malik's khud khisht—Bengal Tenancy Act (VIII of 1885) Secs 5(5), 120—Proprietor's private land—Presumption.

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1905.

May, 10, 17.

Indigo zeraif lands, in the absence of evidence to shew that the lands were ever in the khas possession of the landlord, or their ancestors, do not come within the definition of proprietor's private lands contained in section 120 of the Bengal Tenancy Act.

The presumption arising under section 5 (5) of the Bengal Tenancy Act is a rebuttable one.

A raiyat of at least 10 years' standing and now holding over is not a trespasser and cannot be ejected until his tenancy has been determined by a notice to quit or in some other legal manner.

Suit for khas possession on ejectment.

Appeal by the Defendant.

The facts of the case appear from the judgment.

Mr. Garth and Babus Rajendra Nath Bose, Digamdar Chatterji and Surendra Krishna Dutt for the Appellant.

Moulvie Mahomed Yusuff and Babu Lachmi Narain Singh for the Respondents.

(C.A. N.)

The judgment of the Court was delivered by

Rampini J.—The suit giving rise to this appeal was brought by the plaintiffs respondents against two sets of defendants of whom defendant 1st party, the appellant before us, is the proprietor of an Indigo Factory, in the District of Darbhanga, called the Bandhar Factory. The defendants 2nd party are the proprietors of the Hathouri Factory; they did not contest the suit which was one for ejectment of the principal defendant. Plaintiffs, as proprietors of mouzah Ballipura Pasram, prayed for recovery of khas possession of certain lands, comprising 181 bighas 19 cottahs and 12 dhurs, on the adjudication that they are not the *kasht* lands of the defendant, who is holding over after expiration of certain leases. They also asked for a declaration that the settlement record, as finally published, based on the order of the 18th April 1900 is wrong and illegal,

May, 17.

* Appeal from Original Decree No. 428 of 1903 against a decree of Babu Kali Kishen Chowdhury, Additional Subordinate Judge of Tirhoot, dated the 18th September 1903.

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and, that the order of the Assistant Settlement Officer, dated the 17th July 1899, is legal and binding between the parties to the suit.

The Subordinate Judge decreed the suit. Defendant 1st party appeals, the appeal is on the merits generally. It is urged on his behalf that, out of the total area in suit (181 B. 19 C. 12 D.), half of 313 B. 12. C. 10 D, namely, 156 bighas 19 cottahs 5 dhurs, have been held since the year 1837 as Indigo kasht of the Factory; that the defendant has a right of occupancy in respect of these lands which are not, and never were, the Khud kasht lands of the lessors; and that, with regard to the remaining lands, 25 bighas, 7 dhurs, which were leased to the defendant, as Khud Kasht, in the year 1892, the defendant is entitled to a legal notice to quit before he can be ejected.

We are of opinion that the appeal must prevail and the plaintiffs' suit be dismissed.

The larger of the two areas is half of 313 bighas, 18 cottahs 10 dhurs. These lands were leased by the maliks of mouzah Ballipura Pasram for settled periods to the owners of the Hathouri Indigo concern, which was the parent of the Bandhar Factory. It is an admitted fact that the proprietors of the two Factories have been in successive possession of these lands for the purposes of Indigo cultivation since the year 1837. Their earliest lease is not forthcoming, but a copy filed, even if we exclude from it certain words which are not admitted to exist in the original, shows that so long ago as 1837, the Indigo planters obtained 300 bighas, including the larger of the two areas in suit, for the cultivation of indigo and other crops.

The term of the first lease ended with 1253 F (= 1846). There is no lease for the next thirteen years, but the Factory remained in possession of the lands. In the second lease of 1859, the Factory obtained the exact area with which we are now dealing, namely, 156 bighas 19 cottahs, 5 dhurs, and the subsequent leases continued the tenancy down to the year 1308 F (= 1901).

Having regard to the leases, the Road Cess Returns, and the evidence generally, we are of opinion that the expression *Zerait Ballipura* used in the leases refers to the lands held as Zerait by the cultivator Factory, and does not imply that the lands are the *nij jotè* of the proprietors, in which no right of occupancy can now be acquired. We have no doubt as to the correctness of the defendant's contention on this point. The Civil Courts, in the year 1850, designated such lands as the kasht kari Zerait of

the Factory. Private lands of the maliks were known as their Khud Kasht. The parties differentiated between Factory Zeraït and malik's Khud Kasht. There being no evidence to show that the lands were ever in the khas possession of the plaintiffs, or their ancestors, our finding is that this Indigo Zeraït does not come within the definition of proprietor's private lands contained in section 120 of the Bengal Tenancy Act.

We proceed to consider, in the next place, the question whether the defendant is an occupancy raiyat of the original area, 156 bighas 19 cottahs 5 dhurs, and whether he is entitled to notice before he can be ejected from it or from the other lands 25 bighas 7 dhurs.

We are unable to accept the contention for the plaintiffs that the leases, in virtue of which the Factory has been in possession, are merely *Zarpeshgi* leases. Reliance is placed on the case of the *Bengal Indigo Company v. Raghobur Das* (1) where their Lordships held that "the leases in question were not mere contracts for the cultivation of the land let; but that they were also intended to constitute, and did constitute, a real and valid security to the tenant for the principal sums which he had advanced, and interest thereon. The tenant's possession under them was, in part at least, not that of cultivators only, but that of creditors operating payment of the debt due to them, by means of their security." The leases under our consideration do not admit of a construction upon the principles laid down by the Privy Council. The earliest lease, which originated and covers the tenancy, is a *Zarpeshgi*, it is a lease for the cultivation of indigo and other crops, but there is no stipulation for the payment of interest. We would regard it as a lease, providing for part of the rent to be paid in advance the remainder of the rent being payable annually. During the long interval succeeding the termination of this lease the Factory continued to cultivate the lands demised. Then, the second lease, of 1859, is not a *Zarpeshgi*; it recites that the land is zeraït of the Factory. The next is a *Zarpeshgi* lease similar to the lease of 1837 and providing for the deduction of the sum advanced from the rents of two years, but providing also for the payment of rent during the other years of the lease. In 1879 another *Zarpeshgi* was executed of like nature, but the last lease of 1891 was a simple *thika* pottah.

Looking to the character of all these leases, the Road Cess .

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—

Returns, in which the plaintiffs described the lessees of the disputed land as cultivating raiyats, and the long continued possession of the lands as private lands (Zerai) of the Factory, we cannot resist the conclusion that the defendant is a raiyat entitled to grow indigo, poppy, or any other crops on payment of an annual rent of Rs. 5 per bigha.

The pleader for the defendants respondents has, however, cited to us the case of *Lal Bahadoor Singh v. E. Solano* (1) and he urges that the defendant did not become proprietor of the Factory until after the year 1891 when the latest lease was executed. Consequently, it would appear, that the defendant personally had not been in possession, for twelve years, of the lands in respect of which he claims to be an occupancy raiyat, when the lease came to an end in 1901. We, however, have found that he is clearly a raiyat of the land in dispute.

It is true that the area of the lands held by the defendant exceeds one hundred bighas. We think, however, that the presumption arising under section 5(5) of the Bengal Tenancy Act has been amply rebutted, and that the defendant is not a tenure holder of the area 156 bighas, 19 cottahs 5 dhurs.

In these circumstances, we consider it is not necessary for the purposes of this case to come to any definite finding whether the defendant is an occupancy raiyat or not. In any view of the matter he is a raiyat of at least 10 years' standing, and is now holding over, and that being so, he cannot be ejected until his tenancy of the larger area in dispute has been determined by a notice to quit or in some other legal manner. This admittedly has not been done. Hence the defendant, who is certainly not in the position of a trespasser, cannot be ejected in this suit, and the suit as framed must fail.

So with regard to the smaller area, 25 bighas, 7 dhurs, which is, admittedly, the Khud Kasnt of the plaintiffs, for similar reasons the suit cannot succeed, no notice to quit having been given and the defendant's tenancy of the lands not having been determined.

The result is that we allow this appeal and dismiss the plaintiffs' suit with costs here and heretofore.

B. M.

Appeal decreed.

Before Mr. Justice Stephen and Mr. Justice Doss.

AMJAD ALI AND OTHERS

v.

KADERJAN BIBI AND OTHERS.*

Civil.

1908,

November, 10, 20.

Non-occupancy raiyat—Accretion—Bengal Allotment and Dilution Regulation (XI of 1825) Sec. 4 cl. (1).

A non-occupancy tenant can acquire a right to hold a newly-formed land as an accretion to his holding under cl. (1) of section 4 of Regulation XI of 1825.

Ahmed Bepari v. Toki Mahomed (1) followed.

Zuhurrodeen Paikar v. Campbell (2) and *Beni Pershad Koeri v. Chaturi Tewary* (3) distinguished.

Appeal by the Defendants.

Suit for possession.

The facts of the case and arguments appear sufficiently from the judgment.

Babu Harendra Narayan Mitra for the Appellants.

Moulvi Serajul Islam and Babu Hari Charan Sarkhel for the Respondents.

C. A. V.

The judgment of the Court was as follows:

This suit is brought by the plaintiff for possession of a plot of land which he claims as an accretion to his jote. The accretion is not denied; and it is found that at the time of the suit, the plaintiff was an occupancy tenant. At the time of the accretion, however, he was a non-occupancy tenant, and the question before us is whether Reg. XI of 1825, section 4 applies to the case.

November, 20.

The appellant relies on the decisions in *Zuhurrodeen Paikar v. Campbell* (2), and *Beni Pershad Koeri v. Chaturi Tewary* (3) to show that it does not. The former case referred to a tenant from year to year and it was held that he was not entitled to the benefit of the section. In the latter, a fresh agreement for a year's tenancy was actually made every year, so that the tenant never had any interest in the land beyond the end of the current year. Neither of these cases, therefore, touch the case of a non-occupancy tenant.

* Appeal from Appellate Decree No. 941 of 1906, against the decree of Babu Kalipada Mukerji, Subordinate Judge of Tipperah, dated the 28th February 1906, affirming that of Babu Hem Kumar Neogi, Munsiff of Chandpur, dated the 23rd December 1901.

(1) (1894) 8 C. L. J. 538.

(2) (1865) 4 W. R. C. R. 57.

(3) (1906) 4 C. L. J. 63; I. L. R. 33 Calc. 444.

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On the other hand the decisions in the unreported cases, S. A. No. 866 of 1893 (1) following the judgment in *Bhaggobut Pershad Singh v. Doorg Bejoy Singh* (2), and S. A. No. 2520 of 1904 (3) are direct authorities for holding that a non-occupancy tenant can acquire a right under section 4. The former case is on all fours with the present, and we have no hesitation in following it.

The appeal is, therefore, dismissed with costs.

A. T. M.

Appeal dismissed.

(1) Since Reported, see below ; 8 C. L. J. 538.—Rep.

(2) (1871) 16 W. R. (C. R.) 95. (3) Since Reported—8 C. L. J. 541.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

AHMED BEPARI AND OTHERS

v.

TOKI MAHOMED AND OTHERS.*

CIVIL.
1894.
May, 7.

Admissibility—Dastak—Registration Act (III of 1877), Sec. 17 cl. (d)—Non-occupancy raiyat—Accretion—Bengal Alluvion and Diluvion Regulation (XI of 1825), Sec. 4 cl. (1).

An unregistered *dastak* which merely allows the plaintiff to take possession of the land and to cultivate it, is not a lease for any term exceeding one year, or a lease from year to year or a lease reserving a yearly rent, within the meaning of cl. (d) of section 17 of the Registration Act, and is, therefore, admissible in evidence.

A non-occupancy raiyat can claim a newly-formed land as an accretion to his holding under cl. (1), section 4 of Regulation XI of 1825.

Bhaggobut Pershad Singh v. Doorg Bejoy Singh (1) referred to.

Appeal by the Plaintiffs.

Suit for possession of *chur* land.

The facts of the case and arguments appear sufficiently from the judgment.

Babus Srinath Dass and Promotho Nath Sen for the Appellants.

Babu Akhoy Kumar Banerjee for the Respondents.

The judgment of the Court was delivered by

Banerjee J.—This appeal arises out of a suit for recovery of possession of 6 *kanis* of *chur* land, which the plaintiffs appellants allege consist of 1½ *kanis* of land originally settled with them

* Appeal from Appellate Decree No. 866 of 1893 against the decree of Babu Girindra Mohun Chuckerbutty, Officiating Subordinate Judge of Tipperah, dated the 22nd February 1893, reversing that of Babu Akhoy Kumar Bose, Munsiff of Muradnagore, dated the 21st December 1891.

(1) (1871) 16 W. R. 95.

by the proprietor on the 25th Aghran 1293 and of alluvial accretions to the same. They say that they had been in possession of this land down to 1297; that they were dispossessed by the defendants; that they brought a suit against the defendants under section 9 of the Specific Relief Act; and that that suit having been dismissed, they are obliged to bring the present suit to establish their right to the land.

The defendants 3 and 4, who contested the suit denied the plaintiffs' right and alleged that the land appertained to their jote.

The first Court gave the plaintiffs a decree; but on appeal by the defendants, the lower appellate Court has reversed that decree holding that the plaintiffs have failed to make out their title to the $1\frac{1}{2}$ *kanis* of land originally leased to them, as the *dastak*, Exhibit I, which is the basis of their title, is inadmissible for want of registration, and that the plaintiffs were not entitled to claim any accretion, as they had no right of occupancy in the $1\frac{1}{2}$ *kanis* of land, the same being *chur* land.

In second appeal it is contended that the lower appellate Court was wrong in holding that the *dastak* was inadmissible for want of registration, and that the plaintiffs were not entitled to claim the accretion to the $1\frac{1}{2}$ *kanis* of land originally leased to them.

We are of opinion that the first contention ought to prevail. The *dastak* merely allows the plaintiffs to take possession of the land and to cultivate it; but it is not, we think, a lease for any term exceeding one year, or a lease from year to year or a lease reserving a yearly rent, within the meaning of clause (d) of section 17 of the Registration Act. That being so, the document was admissible in evidence, and upon the basis of that, the plaintiffs have shewn that they were tenants and had some right in the land let out.

The next question is, what right have they in that land? Their occupation of the land commenced only in 1293, that is, less than 12 years ago. Therefore they could not, by reason of their occupation of the land, have acquired any right of occupancy in the same. It was contended that as they were settled raiyats of the village having rights of occupancy in other lands in that village, they were entitled to claim the same right in respect of this land. But these $1\frac{1}{2}$ *kanis* of land are admitted in the plaint to be *chur* land; and under section 180, sub-section (1), clause (b) of the Bengal Tenancy Act, the plaintiffs

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1894.

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cannot be said to have acquired any right of occupancy in the same, their occupation of the land not having extended over twelve years. That being so, they cannot be said to have acquired any right of occupancy in the additional land that is said to have formed as an accretion to the land originally let out. But there is nothing to prevent the plaintiffs from claiming the newly-formed land as an accretion to their holding in their right as non-occupancy raiyats. It has been held by this Court in the case of *Bhagobut Pershad Singh v. Doorg Bejoy Singh* (1), that even a tenant-at-will can claim the benefit of clause 1 section 4 of Regulation XI of 1825; and that decision has been recently approved and followed by a Full Bench of this Court in the case of *Gaurhari Kaibarto v. Bhola Kaibarto* (2), but here it is to be observed that the appellate Court has not decided the question whether the portion of the land in suit, that is in excess of the $1\frac{1}{2}$ *kanis* originally let out is really an accretion to that area. It is necessary therefore to send the case back to the lower appellate Court for the determination of that question. If the lower appellate Court finds that the land that is claimed as an accretion to the area originally let out, did form as a gradual accretion to it, the plaintiffs will be entitled to a decree for possession of the same in their right as non-occupancy raiyats. If the fact is found otherwise, the plaintiffs' claim to the additional quantity of land as an accretion must be dismissed.

The result then is that the plaintiffs are entitled to a decree for the $1\frac{1}{2}$ *kanis* originally let out to them to be held by them as non-occupancy raiyats; and the case must be remanded to the lower appellate Court with reference to the remaining quantity of $4\frac{1}{2}$ *kanis* for the determination of the question stated above and for a decision upon that question in accordance with the directions contained in this judgment.

The costs of this appeal will abide the result of the remand.

A. T. M.

Case remanded.

(1) (1871) 16 W. R. 95.

(2) (1894) I. L. R. 21 Calc. 233

Before Mr. Justice Gidde

MIAJAN AND OTHERS

v.

AKRAM ALI BHUIYA AND OTHERS.*

Civil

1907.

January, 8.

Non-occupancy raiyat—Accretion—Terms of holding accreted land—Bengal Alluvion and Diluvion Regulation, (XI of 1825), section 4 cl (1).

Section 4, clause (1) of Regulation XI of 1825 applies to the case of a person who is not an occupancy raiyat.

Beni Pershad Koeri v. Chatur Tewary (1) explained.

The person to whose land the accretion is formed is entitled to hold the accreted land on the same terms as that by which the land to which it is an accretion is held.

Gaurhari Kaibarto v. Bhola Kaibarto (2) followed.

Appeal by two of the Principal Defendants.

Suits for possession.

The facts of the case and arguments appear sufficiently from the judgment.

Babu Dhirendralal Khastgir for the Appellants.

Moulvi Serajual Islam for the Respondents.

The judgment of the Court was as follows :

The finding of the Subordinate Judge as to the nature of the land which is the subject of the present suit is expressed in the following words : " The fact clearly is that a large quantity of *chur* gradually formed by the slow recession of the river and the portion which was fit for cultivation or was about to be fit for cultivation was let to the plaintiffs, and the remaining portion which was then in course of formation but was still under water was not included in plaintiff's settlement."

The land in dispute is the land which is here referred to as the remaining portion which was then in the course of formation but was still under water. The Subordinate Judge has held that on these facts the plaintiff is entitled to settlement from Government and *prima facie* he is so entitled under the first clause of section 4 of Regulation XI of 1825. That clause runs as follows : " When land is gained by gradual accretion.....it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land be held....."

* Appeals from Appellate Decrees Nos. 2520 and 2912 of 1904, against the decrees of Babu Prankrishna Biswas, Additional Subordinate Judge of Chittagong, dated the 29th July 1904, reversing that of Babu Rajkumar Bose, Munsiff, 1st Court of that place, dated the 13th February 1904.

(1) (1906) 4 C. L. J. 63 ; I. L. R. 33 Calc. 444.

(2) (1894) I. L. R. 21 Calo. 233.

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1907.

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v.

Akram Ali Bhaiya.

.....as a subordinate tenure by any description of under-tenant whatever." The meaning of these words, to my mind, is quite clear; that is, the person to whose land the accretion is formed is entitled to hold the accreted land on the same terms as that by which the land to which it is an accretion is held and this view of the law was affirmed in the Full Bench Ruling, *Gourhari Kaibarto v. Bhola Kaibarto*. (1)

It has been argued on behalf of the appellant that the plaintiff not having been 12 years on the parent land has acquired no right of occupancy and that section 4 of Regulation XI of 1825 does not apply. In support of this view, he refers me to the case of *Beni Pershad Koeri v. Chaturi Tewary*. (2)

But that case was very different from the present one. There, the land was settled each year by the zemindar and this Court held that the plaintiff was not entitled to the accreted land inasmuch as he had no pre-existing right to the parent land. But those very words indicate the distinction between that case and the present. The plaintiff though he may not be an occupancy raiyat had a pre-existing right to the parent land. The land has been settled with him by Government and he is entitled to hold it as against all the world.

Both the appeals, therefore, fail and are dismissed with costs.

A. T. M.

Appeals dismissed.

(1) (1894) I. L. R. 21 Calc. 233.

(2) (1906) I. L. R. 33 Calc. 441.

Before Mr. Justice Mookerjee.

NITYA MADHAV DAS

v.

SRINATH CHANDRA CHUCKERBUTTY AND OTHERS.*

CIVIL.

1907.

February, 8.
April, 4.*Hindu widow—Remarriage, effect of—Alienation—Legal necessity—Reversioner.*

If a transfer is made by a Hindu widow for legal necessity and before her remarriage, the position of the purchaser from the widow remains unaffected by her subsequent marriage. Unless the transfer was for legal necessity, it can not bind the reversionary heir who will be entitled to take the property from the purchaser after the death of the widow or after she had forfeited her estate by reason of her remarriage.

* Appeal from Appellate Decree No. 1274 of 1905, against the decree of A. C. Sen, Esq., District Judge of Zillah Bankura, dated the 31st March 1906, affirming that of Babu Sarada Prosad Dutta, Officiating Munsiff 1st Court at Bishenpur, dated the 30th April 1904.

No Letters Patent Appeal was preferred against this decision—Rep.

Matungini Gupta v. Ram Rutton Roy (1), *Rasul Jehan v. Ram Surun* (2), *Murugayi v. Viramahall*, (3), *Vithu. v. Govinda* (4) and *Panchappa v. Sangarbasawa* (5) followed.

Har Suran. v. Nandi (6) and *Ranjit. v. Radha Rani* (7) dissented from.

Quere—Whether on principle an unauthorized alienation by a widow ought to be allowed to subsist beyond the extinction of her own title which alone could pass to her transferee.

Appeal by the Plaintiff.

Suit for possession.

The facts of the case and arguments appear sufficiently from the judgment.

Babu Digambar Chatterjee for the Appellant,

Babus Golap Chandra Sarkar and Sarat Chandra Dutt for the Respondents.

C. A. V.

The judgment of the Court was as follows :

Mookerjee J.—The subject matter of the litigation which has given rise to this appeal, is a tank which admittedly belonged to one Tarachand, who died about April 1898, leaving a childless widow Mandakini and a nephew Radhanath. The defendants claim to have acquired title by purchase from the widow on the 15th June 1898. The plaintiff on the other hand claims title through one Ram Brahmo who took a conveyance from the nephew on the 7th July, 1898. The substantial question is controversy between the parties is, which of them has the preferential title to the property. It is admitted that Mandakini married a second time on the death of Tarachand, but it has not been found whether her remarriage took place before or after she executed the conveyance in favour of the defendants. The Courts below have dismissed the suit on the ground that the widow had a valid subsisting title at the date of the conveyance executed by her. The plaintiff has appealed to this Court, and on his behalf the decision of the District Judge has been assailed, substantially, on three grounds, namely, *first* that the Courts below ought to have determined whether the re-marriage of Mandakini took place before or after she transferred the property to the defendants, *secondly*, that if the transfer took place before her re-marriage, the Courts should have found whether it was for legal necessity, and *thirdly*, that if the transfer was without legal neces-

(1) (1891) I. L. R. 19 Calc. 289.

(2) (1893) I. L. R. 22 Calc. 589.

(3) (1877) I. L. R. 1 Mad. 226.

(4) (1896) I. L. R. 22 Bom. 321 F. B.

(5) (1899) I. L. R. 24 Bom. 89 at 93.

(6) (1889) I. L. R. 11 All. 380.

(7) (1898) I. L. R. 20 All. 476.

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Chakrabarty.

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Nitya Madhav Das

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Mookerjee, J.

sity or if it was made after the re-marriage of the widow, the plaintiff is entitled to succeed. In my opinion, these contentions are well founded and must prevail.

The questions raised on behalf of the appellant made it obvious that the Courts below have overlooked the fundamental point in the case. If the transfer was made by Māṇḍakini for legal necessity and before her remarriage, it cannot be disputed that the position of the purchaser remained unaffected by her subsequent marriage. It is also clear that unless the transfer was for legal necessity, it could not bind the reversionary heir who would be entitled to take the property after the death of the widow or after she had forfeited her estate by reason of her remarriage. It is therefore necessary to consider for a moment the effect of remarriage by a Hindu widow upon the estate taken by her from her deceased husband. Now it was laid down by a Full Bench of this Court in the case of *Matungini Gupta v. Ram Rutton Roy* (1), that the effect of remarriage by a Hindu widow is to make her forfeit her interest in her first husband's estate in favour of the next heir. This result follows not only from the principles of Hindu law but also from the statutory provisions on the subject. As was pointed out by the learned Judges who decided the case to which I have just referred, according to the text of Brihaspati, which Jimutabahana makes the basis of his reasoning on the subject of widow's estate, "of him whose wife is not deceased, half the body survives; how then should another take his property while half his person is alive," Dayabhaga, Chapter XI, section 1. If therefore a widow ceases to be the wife or half of the body of her late husband, it is difficult to perceive how she can keep the estate of her late husband, and in this view of the matter remarriage would entail a forfeiture of the first husband's estate. It further appears from section 2 of the Hindu Widows Remarriage Act (XV of 1856), that a Hindu Widow upon remarriage forfeits the interest she had taken in her deceased husband's property, or to use the language of the statute, upon her re-marriage, her interest in her husband's estate ceases and determines, as if she had then died, and the next heirs of her deceased husband or other persons entitled to the property on her death, thereupon succeed to the same. This view has been adopted in the cases of *Murugayi v. Viramakali* (2), *Rasul Jehan v. Ram Suhu* (3), *Vithu v. Govinda*, (4) and *Panchappa v.*

(1) (1891) I L. R. 19 Calc. 289.

(3) (1895) I L. R. 22 Calc. 589.

(2) (1877) I. L. R. 1 Mad. 226.

(4) (1896) I. L. R. 22 Bom. 321 F. B.

Sanganbasawa (1). The contrary view taken by the learned Judges of the Allahabad High Court in *Ranjit v. Radha Rani* (2) and *H. Saran v. Nindi* (3) does not appear to me to be based upon a sound interpretation of either the principles of Hindu Law, or, the provisions of the Hindu Widows Remarriage Act, and I see no reason to doubt the correctness of the opinion which has been expressed by this Court and accepted in Bombay and Madras. If, therefore, at the time when the alienation was made by the widow in this case, she had already remarried, she had nothing to convey to the purchaser, and the plaintiff as transferee from the nephew would be entitled to succeed. If, on the other hand, the alienation in favour of the defendants took place before the remarriage of the widow, two questions arise: First, was the transfer for legal necessity? Secondly, if it was not, is the position of the purchaser affected by the remarriage of the widow? If the transfer was made for legal necessity at a time when the widow had not remarried, the purchaser has obviously acquired a good title, and the plaintiff is not entitled to succeed. If on the other hand, the transfer in favour of the defendants was made before remarriage but without legal necessity, the purchaser would have a good title till the death of the widow, natural or civil. It is obvious to my mind from section 2 of Act XV of 1856, that the effect of remarriage of a widow is that her interest ceases and determines, as if she had then died, and the reversionary heir who would be entitled to succeed on her natural death, takes the property at once. It cannot be disputed, therefore, that if the transfer was without legal necessity, the subsequent remarriage of the widow would place the purchaser precisely in the position which he would have occupied, if the widow had died, in other words, the reversionary heir would be entitled to recover the property from his hands. Reference was made to the cases of *Gobindo Nath Roy v. Ram Kanay Chowdhury* (4), *Kally Frosonno v. Gocool Chunder* (5), *Prosonna Nath v. Afzalannessa* (6), and *Sreeramulee v. Kristamma* (7), to show that when a Hindu widow alienates part of the immoveable property belonging to her husband's estate and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widow-hood. On the basis of this proposition, it was argued by way of analogy, that when a Hindu

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(1) (1899) I. L. R. 24 Bom. 89 at 93.

(4) (1875) 24 W. R. 183.

(2) (1898) I. L. R. 20 All. 476.

(5) (1877) I. L. R. 2 Calc. 295 at 307.

(3) (1899) I. L. R. 11 All. 330.

(6) (1878) I. L. R. 4 Calc. 523; 3 C. L. R. 391.

(7) (1902) I. L. R. 26 Mad. 143.

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widow alienates part of the property belonging to her husband's estate, and then remarries, the reversionary heir ought not to be permitted to recover possession of the property until the termination of her natural life. In my opinion, there is no analogy between the two cases. In the case of a remarriage of a Hindu widow, the very fact of remarriage operates as her death in the eye of law so far as her husband's estate is concerned ; this proposition is consistent with the principles of Hindu law and follows also from the provisions of the Hindu Widows Remarriage Act. I may further point out that the analogy upon which reliance was placed is based upon a proposition which does not appear to be entirely beyond the domain of controversy. If the question arose directly in this case, it might be necessary to consider whether on principle an unauthorised alienation by a widow ought to be allowed to subsist beyond the extinction of her own title which alone could pass to her transferee ; such a view apparently receives some support from the decision of their Lordships of the Judicial Committee in *Bonomali v. Jagut* (1), and of the learned Judges of the Bombay High Court in *Moro v. Balaji* (2). It is not necessary, however, to pursue this matter further, because as I have already explained, in the case of remarriage, the reversionary heir becomes entitled to the estate precisely in the same manner as he would do upon the death of the widow. The result, therefore, is that this appeal must be allowed, the decision of the District Judge reversed, and the case remitted to him for trial upon the merits in accordance with the directions given in this judgment. The parties will be at liberty to adduce fresh evidence to be taken either by the District Judge himself, or under his direction by the Court of first instance, and to be transmitted to him for final disposal of the case. The costs of this appeal will abide the result.

A. T. M.

Appeal allowed ; case remanded.

(1) (1905) I. C. L. J. 319. (2) (1894) I. L. R. 19 Bom. 809.

*Before Mr. Justice Caspersz and Mr. Justice Coxe.**

BEPIN BEHARY SHAHA

CIVIL.

1908

November, 13, 18.

MUKUNDA LAL GHOSH AND OTHERS.*

Redemption and sale, suit for, by subsequent mortgagee—Purchaser in execution of prior mortgage decree in possession, position of—Redemption money, deposit of, after date fixed but before order absolute—Deposit accepted by Court—No formal order extending time—Transfer of property Act (IV of 1882), section 93.

Defendant purchased a certain property in execution of decree on a suit by a first mortgagee in which the plaintiff, a third mortgagee was no party. He (the defendant) redeemed the second mortgagee and was in possession of the property. The plaintiff sued to enforce his mortgage as also to redeem prior incumbrances.

Held, that section 93 of the Transfer of Property Act did not, in its literal terms, apply to a case where there was no prior mortgage still in existence, but the principles there laid down ought to be followed in dealing with such a case.

The plaintiff who did not deposit the redemption money within the time allowed by Court can redeem afterwards, before a final order is made under clause 2 of section 93 of the Transfer of Property Act, that is before the decree is made absolute.

Vedapuratti v. Vallabha Valiya Raja (1) followed.

Nandram v. Babaji (2), *Poresk Nath Moyundar v. Ramjadu Moyundar* (3) and *Debi Prasad v. Jai Karan Singh* (4) referred to.

The position of the defendant, who is in possession of the property under an obligation to re-transfer it, if the redemption money is paid on a fixed date, is analogous to that of a mortgagee by conditional sale.

If a deposit of the redemption money is accepted by the Court before the final order under clause 2 of section 93 of the Transfer of Property Act, but after the date fixed for payment, it becomes an effectual deposit, although no formal order extending the time was passed.

Appeal by the opposite party.

Application to have the decree made absolute.

The facts of the case and arguments appear sufficiently from the judgment.

Babu Nilmadhub Bose, Mr. P. M. Guha and Babu Haribhusan Mukerji for the Appellant.

Babu Nalin Ranjan Chatterji for the Respondents.

C. A. V.

* Appeal from Appellate Order No. 70 of 1908, against the order of K. N. Roy Esq., District Judge of Beerbhoom, dated the 25th November 1907, reversing that of Babu Umesh Chandra Sen, Subordinate Judge of that place, dated the 27th July 1907.

(1) (1901) 1 L. R. 25 Mad. 300 at 306-7.

(3) (1889) 1 L. R. 16 Calc. 246.

(2) (1897) 1 L. R. 22 Bom. 771.

(4) (1902) 1 L. R. 24 All. 479.

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v.

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Ghosh.

November, 18.

The judgment of the Court was as follows :

This appeal arises out of a composite suit, in which the plaintiff sued to enforce his mortgage on certain property by sale, as, also, to redeem certain prior incumbrances. The suit was decreed and the plaintiff was directed to deposit the amount due with respect to the prior incumbrances within six months, and it was ordered that, if he did not do so, he should not be able to redeem. The decree was dated the 31st May 1906. An appeal was lodged by the defendants or some of them, but it was dismissed on some date, which does not appear on the papers, and on the 16th April 1907, the plaintiff deposited the money, and asked that the property covered by the mortgage might be sold free of incumbrances, the prior mortgages having been redeemed by the deposit of the money due upon them. The pleader of one of the prior incumbrancers (not the present appellant) was sent for, but declined to appear, and the application was granted on the 14th May 1907.

Thereafter, the plaintiff applied to have the decree made absolute. This application was contested by the prior incumbrancers, though it can hardly have had any reference to them, inasmuch as the only relief in the nature of an "order absolute" that can be given to the plaintiff in a suit for redemption is that he "shall, if necessary, be put in possession of the mortgaged property." Here, this was not necessary and the only order that could be made absolute was the order for sale, to which, if their incumbrances had been redeemed by the order of the 14th May 1907, they could not object. They however, also, asked that the order for sale and redemption should be set aside. The Subordinate Judge refused both prayers, made the decree absolute, and confirmed the order for sale and redemption. The learned District Judge set aside these orders. The plaintiff appeals, and it is argued that, in the circumstances we have stated, the orders of the first Court were wrongly set aside by the District Judge.

It appears that the defendant No. 3, respondent, purchased the property in execution of a first mortgagee's decree upon his mortgage. He has a further claim on the property, inasmuch as he also redeemed the mortgage of a second mortgagee, the plaintiff being the third mortgagee. The question is whether the defendant No. 3 being a purchaser in execution of the decree or a prior mortgage, and in possession of the property, Section 92 of the Transfer of Property Act, 1882, has any application to his case. It is, also urged on his behalf that if the section doe

apply, still the fact that the plaintiff did not deposit the redemption money within six months precludes him from obtaining any benefit now from the decree for redemption.

Section 93 does not, of course, in its literal terms, apply to a case like the present, where there is no prior mortgage still in existence, but the incumbrancer is a purchaser in possession. But we think that the principles laid down in the section ought certainly to be followed in dealing with a case of this nature. It is well settled that when a mortgagee sues on his mortgage, and in disregard of section 85, does not make a subsequent mortgagee a party, that mortgagee is entitled to redeem the property in the hands of a purchaser in execution. There is no reason why such a purchaser should be in a better position with respect to redemption than the mortgagee, under whose decree he has purchased. There are no other sections in the Transfer of Property Act dealing with redemption, except sections 91-95. In these circumstances, we are of opinion, that we should be guided by those sections in dealing with the case, whether it is covered by their precise terms or not.

Turning now to the question whether a plaintiff, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under the section, or, as it is usually expressed, before the decree is made absolute, we find considerable diversity of judicial opinion. The sections, however, seem to us to indicate the intentions of the Legislature with reasonable clearness.

Section 92 requires, if the plaintiff pays within a fixed time, the defendant shall retransfer the property to him, and if he does not pay, he shall be debarred from redeeming (unless the mortgage is simple or usufructuary), or else the property shall be sold (unless the mortgage is by conditional sale.) The words in brackets show that the section does not literally apply to the present case. But, applying it as nearly as we can, we think that the position of the defendant No. 3, who is in possession of the property under an obligation to retransfer it, if the money is paid on a fixed date, is far more analogous to that of a mortgagee by conditional sale, than to that of the holder of any other form of mortgage described in the Transfer of Property Act. The decree framed gave effect to this position, inasmuch as it directs that if the plaintiff does not deposit the money by the fixed date, he shall be debarred from redeeming.

Section 93 lays down what is to happen in the two contin-

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gencies of the money being paid and not being paid. In the latter, the defendant is permitted, in the case of a mortgage by conditional sale, to apply for an order that the plaintiff be debarred from redeeming. And the section goes on to prescribe that "on the passing of any order under this section the plaintiff's right to redeem shall be extinguished." It appears to us that this expression clearly indicates that the right to redeem continues till the order has been passed. If this were not so, it is impossible to understand for what reason a mortgagee, other than one whose mortgage was simple or usufructuary, should be specifically allowed to apply for an order to debar the plaintiff from redeeming. If the plaintiff cannot redeem after the fixed period, unless the mortgagee himself takes some action, as has been argued by the learned pleader for the respondents, it is evident that his right is altogether gone. The mortgagee is not likely to take any action, when he is already in possession of the property, in order to enable the plaintiff to exercise his right of redemption. To quote the words of the learned Chief Justice in *Vedapuratti v. Vallabha Valiya Raja* (1). "On the construction of sections 92 and 93 of the Transfer of Property Act it is perfectly clear that the equity of redemption remains unforesclosed, and the relation of mortgagor and mortgagee continues, until the order absolute which is contemplated by section 93 is made. If the right to redeem is only extinguished when an order is made under section 93, it follows that the right is a subsisting right until the order is made." It appears to us that the Legislature intended that the defendant, if he seeks to have the plaintiff's right finally extinguished, should apply for an order to that effect; and that, if he does not do so, the right should remain in existence.

These views derive considerable support from the Madras case already cited, and from two cases decided in Bombay and Calcutta respectively. The Bombay case, *Nandram v. Babaji* (2) was cited with approval in the *Madras case* (1), and is clear authority for the proposition that a mortgagor can apply for extension of the time for redemption after the period of grace has elapsed, but before a final order has been made under section 93. If that view is correct, it would seem that if a deposit is accepted by the Court before the final order, but after the date fixed for payment, it becomes an effectual deposit. It makes little or no practical

(1) (1901) I. L. R. 25 Mad. 300 at 306-F. (2) (1897) I. L. R. 22 Bom. 771.

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difference whether the acceptance of such a deposit is or is not preceded by a formal order extending the time. It is the acceptance of the deposit that is the really important matter, and if the Court accepts a deposit after the due time has elapsed, it must be assumed, in the absence of anything to the contrary, that the Court is satisfied that there has been good cause for the delay. In the present case it is reasonable to suppose that the Court thought it natural that the plaintiff should have hesitated to pay in a large sum of money, while the fate of his decree was still rendered uncertain owing to the appeal lodged by the other side. The Court sent for the pleader of the principal defendant and made the order after he had declined to come. All the probabilities point to the fact that the Court saw fit to condone the plaintiff's delay, and, that being so, we think that the deposit must be regarded as being in time and upon application made to extend the original period fixed for payment.

The decision of this Court, to which we have referred, considered section 87 rather than the effect of section 93, but it is clearly applicable in principle—see *Poresh Nath Mojumdar v. Ramjadu Mojumdar* (1), where the learned Judges remark:—"It seems quite clear to us that the fact of the Legislature having made this provision, requiring an order absolute to be made, makes the earlier order simply an order nisi, and the mortgagor can at any time, until the order absolute is made, redeem his property."

Reference may also be made to *Debi Prasad v. Jai Karan Singh* (2), in which the earlier case of *Ram Lal v. Tulsee Kuar* (3), which is to some extent in favour of the respondents, was not followed.

The learned pleader for the respondents relies principally on two cases, namely, *Vallabha Vahya Rajah v. Vedapuratti* (4) and *Fajjuddi Sardar v. Asimuddi Biswas* (5). But the authority of the first of these cases has been much weakened by the case reported in the 25th Volume already quoted, and, in the words of the learned Chief Justice in the latter case, "cannot be put higher than that the learned Judges dealt with the case before them upon the assumption that a second suit would lie and that . . . the mortgagor . . . is not without a remedy."

Finally all that was decided in *Fajjuddi Sardar v. Asimuddi Biswas* (5), was that the period of grace runs from the date of

(1) (1889) I. L. R. 16 Calc. 246. (249.)

(3) (1896) I. L. R. 19 All. 180.

(2) (1902) I. L. R. 24 All. 479.

(4) (1895) I. L. R. 19 Mad. 40.

(5) (1907) 11 C. W. N. 679.

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the original decree and not from that of the appellate decree. The point whether the plaintiff could redeem after the fixed date was not raised, nor does it appear certain whether or not any final order had been made on the application of the defendant.

In these circumstances, we think that the decision of the District Judge must be set aside, and that of the Subordinate Judge restored. The appeal is accordingly allowed with all costs.

A. T. M.

*Appeal allowed.**Before Mr. Justice Rampini and Mr. Justice Mookerjee.*

AGA MOHAMMAD MEDHI TEHAR ALI

v.

UMESH CHANDRA CHATTERJI.

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1906.

March, 23.

Suit—Dismissal—Appeal by plaintiff and defendant—Procedure.

Plaintiff brought an action for ejectment which was dismissed on the ground that it had been brought for a part of the tenancy, and therefore, not maintainable. The plaintiff appealed and the defendant also filed an appeal against a finding in the judgment as to the nature of the tenancy. The Judge decreed the defendant's appeal and affirmed the order of dismissal:

Held, that the procedure was erroneous. As the suit had been dismissed, the defendant could not appeal. The plaintiff's appeal should have been heard first, and if his grounds proved to have been well-founded, the defendant's objections should then have been considered.

Appeal by the Plaintiff.

Suit for ejectment after notice to quit.

The facts of the case appear from the judgment.

Babus Mohendro Nath Roy and Tarit Mohan Das for the Appellant.

Babus Nilmadhab Bose, Boidyanath Dutt and Bepin Behary Ghose for the Respondent.

The judgment of the Court was delivered by

Rampini J.—This appeal arises out of a suit for ejectment brought by the plaintiff, after giving the defendant notice to quit. The subject of the suit is a small piece of land within the limits of the Hooghly Municipality, which is now used as a garden by the defendant.

The first Court dismissed the suit, on the ground that it had been brought for only a part of the holding and therefore the

* Appeal from Appellate Decree No. 27 of 1905, against the decree of Babu Dina Nath Sarkar, Subordinate Judge, Hooghly, dated the 21st September 1904 reversing that of Babu Saroda Prasad Bakshi, Munsiff, Hooghly, dated the 25th January 1904.

suit must fail. Against this order of dismissal both parties appealed, the plaintiff against the order of dismissal and the defendant against the finding of the Munsiff that the case was governed by the Transfer of Property Act and that therefore the notice of ejectment under the provisions of that Act, was sufficient. The Subordinate Judge has dealt only with the defendant's appeal and has dismissed the suit on the ground that the provisions of the Bengal Tenancy Act apply, and that the defendant has acquired an occupancy right on the land and therefore cannot be ejected at all. He has gone on to say that even if the defendant has not acquired such a right, he is entitled to notice under section 45 of the Bengal Tenancy Act and for this reason also cannot be ejected.

The plaintiff appeals to this Court, and, in support of his appeal, it has been urged that the lower appellate Court should not have entered into the question of the defendant's appeal without first deciding and decreeing the appeal of the plaintiff, that is to say, without deciding that the Munsiff was wrong in holding that the suit was not maintainable, on the ground that the ejectment prayed for was with regard to only a part of the holding.

We think that this ground must prevail. It appears to us that the Munsiff, having dismissed the plaintiff's suit, the Subordinate Judge was not entitled to decree the defendant's appeal, without entering into the question as to whether the suit had been rightly dismissed or not. We therefore set aside the decision of the lower appellate Court and remand the case to the Subordinate Judge. The learned Subordinate Judge will first decide the plaintiff's appeal; and if he finds that the suit is not maintainable, being brought for ejectment from only a part of the holding, then the defendants have nothing to appeal against. It is only on the assumption that the Munsiff's decision of the suit is wrong, that he can enter into the question raised in the defendants' appeal.

For these reasons we set aside the decision of the Subordinate Judge and remand the case to him to be disposed in accordance with the above observations.

The costs will abide the result.

B. M.

Appeal allowed; case remanded.

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Aga Mohammad
Medhi Tehar Ali

Umesh Chandra
Chatterji.

Rampini, J.

Before Mr. Justice Pargiter and Mr. Justice Mookerjee.

AOSUB 'ALI PRAMANIK AND ANOTHER.

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1905.

January, 20.

BISSESHURI, *alias* HARANI DASAYA CHOWDHURANI.*

Putni, share of, purchase of, without the consent of zemindar, effect of—Putni Regulation (VIII of 1819), section 6—Co-sharer landlords collecting share of rent separately, if constitutes separate tenancy—Sale in execution of decree for share of rent, effect of.

A purchaser of a share of a *putni* acquires a valid title in the property, although his purchase was not recognised by the zemindar. He is not exempted from liability for rent jointly with the transferor if the landlord chooses to recognise him as one of the joint-holders of the *putni*. Section 6 of the Putni Regulation only prevents any splitting of the tenure and apportionment of the rent without the sanction of the landlord.

Surenendra Mohan Tagore v. Surnomoyi (1) followed.

Judoonath v. Jadub Churn (2) distinguished.

One of the co-sharers in the zemindari who had a 5 annas interest brought a suit for his share of the rent against the registered putnidar and obtained a decree, in execution of which, he sold a 5 annas interest in the *putni*:

Held—That the effect of the sale was precisely the same as that of a sale under a money-decree; that is, the right, title and interest of the judgment-debtor at the time of attachment passed.

Monomothnath Dey v. Mr. G. Glascott (3) distinguished.

No separate tenancy is constituted under a co-sharer landlord merely by his collecting his share of the rent separately from the tenant.

Appeal by Defendants Nos. 1 and 2.

Suit to recover possession of property by the purchaser of a share of a *putni*.

The facts of the case and arguments appear sufficiently from the judgment.

Babu Sharat Chunder Ray Chowdhury for the Appellants.

Babu Debendra Nath Bagchi for *Babu Kissory Lal Sirkar* for the Respondent.

The judgment of the Court was delivered by

Mookerjee J—This is an appeal on behalf of the defendants in an action for recovery of possession of immoveable property. The plaintiff alleges that one Ratiullah had a *putni* right over the land in suit, that in execution of a decree obtained on a

* Appeal from Appellate Decree No 2292 of 1902, against the decree of *Babu Jogendra Nath Ray*, Subordinate Judge of Patna and Bogra, dated 28th July 1902, affirming that of *Babu Asutosh Chatterjee*, Additional Munsiff of Bogra, dated 17th March 1902.

(1) (1898) 1 L. R. 26 Calc. 103.

(2) (1869) 11 W. R. 294.

(3) (1873) 20 W. R. 275

mortgage, he purchased a half share of the putni on the 18th June 1889, that subsequently a fractional co-sharer in the zemindary brought a suit for rent against Ratiullah and obtained a decree for rent against him and, in execution thereof, put up a 5 annas share of the putni to sale which was thereupon purchased by the defendant No. 1. The plaintiff asks for a declaration that his purchase is entitled to preference over that of the defendant No. 1 and that he is entitled to recover possession as against him.

The Courts below have made a decree in favour of the plaintiff, holding that the plaintiff had acquired a good title by his purchase and that the defendant No. 1, by his purchase at the sale in execution of the decree for arrears of rent obtained by a co-sharer landlord, had obtained merely the right, title and interest of Ratiullah which, at the date of the sale to the defendant No. 1, had already vested in the plaintiff.

In second appeal, it has been argued before us that the view taken by the learned Subordinate Judge is erroneous on two grounds; first, that the plaintiff, as purchaser of a share of the putni, has not acquired any valid title in the property in as much as his purchase was not recognised by the zemindars and, secondly, that the defendant No. 1, as the purchaser at a sale in execution of a decree for arrears of rent in a suit instituted by a fractional landlord, had purchased the property free of the interest of the plaintiff.

We are of opinion that neither of these contentions is sound and both must be over-ruled.

In support of the first contention, reliance has been placed upon sections 5 and 6 of Regulation VIII of 1819 and upon the cases of *Judoonath Shahana v. Jadab Churn Thakoor* (1) and *Watson and others v. The Collector, of Rajshahye* (2). In answer to this argument, the learned vakil for the respondent has relied upon the decision of this Court in the case of *Sourendra Mohan Tagore v. Surnomoyi* (3). In this last mentioned case, the learned Judges, after referring to the provisions of section 6 of Regulation VIII of 1819, go on to say:—“The true meaning and intention of the provision is, we think, not to make the alienation of a fractional portion of a *putni taluk* without the sanction of the zemindar absolutely void, nor even to exempt the transferee from liability for rent jointly with the transferor if

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(1) (1869) 11 W. R. 294.

(2) (1869) 12 W. R. P. C. 43.

(3) (1898) 1. L. R. 26 Calc. 103.

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the landlord chooses to recognize him as one of the joint holders of the *putni*, but only to prevent any splitting of the tenure and apportionment of the rent without the sanction of the landlord, as the concluding words of the section, which contain the reason for the provisions, clearly shew." We entirely agree with this view of the law and we are unable to say that there is in reality any conflict between the case of *Sourendra Mohan Tagore v. Surnomoyi* (1) and the case of *Judoonath Shahana v. Jadub Churn Thakoor* (2). In this last mentioned case, the learned Judges say that the transfer of a share of a *putni* could not perhaps be altogether void although they go on to add that :— "A *putnidar* may generally transfer his tenure without the consent of his zemindar, but he can only do so *in solido* ; and the transfer of a portion in no way affects the existence of the *putni* in its entirety, or the rights of the zemindar." We think that, having regard to the case of *Sourendra Mohan v. Surnomoyi* (1) and sections 5 and 6 of Regulation VIII of 1819, it would be impossible to hold that a transfer of a portion of a *putni* without the consent of the zemindar is altogether void although no doubt, the zemindar is entitled to say that the division is not binding upon him and the purchaser can not compel any apportionment of the rent reserved.

The other case upon which reliance has been placed, namely, the case of *Watson v. The Collector of Rajshahye* (3), has no direct bearing upon the question raised, for all that was laid down in that case was that where a share in a *putni taluk* was transferred by a registered *putnidar* without the express consent of the zemindar and in disregard of Regulation VIII of 1819, the transfer was not binding on the zemindar. That case is no authority for the proposition that the transfer is absolutely null and void. We must hold accordingly that the view taken by the Subordinate Judge that the plaintiff had acquired a good title by his purchase at the execution sale is correct and cannot be disturbed.

As regards the second point, the facts appear to be as follows. One of the co-sharers in the zemindary who had a 5 annas interest brought a suit for his share of the rent against the registered *Putnidar* and obtained a decree. In execution of that decree, he did not put up the entire *putni* to sale. All that he brought to sale was a 5 annas interest in the *putni*. It has been argued before us, upon the authority of the case of *Monomotho*

(1) (1898) 1, L. R. 26 Calc. 103.

(2) (1869) 11 W. R. 294.

(3) (1869) 12 W. R. P. C. 43.

Nath Dey v. G. Glascott (1), that the true effect of this sale is identical with the effect of a sale in execution of a decree for arrears of rent. We do not think that this contention is well founded. The facts of the case of *Monomotho Nath Dey v. G. Glascott* (1) are very peculiar and what the learned Judges substantially found in that case was that there had been a sub-division of the putni, that in fact each co-sharer in the zemindary practically had under him a separate putni. There is nothing to show that, in the present case, the 5 annas co-sharer who instituted the suit for rent had a separate putni under him. We do not think that there is any authority in support of the proposition that, merely because a co-sharer landlord collects his share of the rent separately from the tenant, that alone constitutes a separate tenancy under him. We must take it, therefore, that the effect of the sale in execution of the decree for rent obtained by the co-sharer landlord was precisely the same as that of a sale under a money decree. Consequently, the defendant No. 1 purchased merely the right, title and interest of the judgment debtor at the time of the attachment and, as we have found that at that time his interest had already vested in the present plaintiff, the defendant No. 1, by his purchase got nothing. The plaintiff, therefore, has clearly a preferential right and is entitled to succeed. Upon these grounds, we affirm the judgment of the learned Subordinate Judge and dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

(1) (1873) 20 W. R. 275.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

RAKTOO SINGH AND OTHERS.

v.

SUDHRAM AHIR AND OTHERS.*

Possession, suit for—Defence, alternative—Possession either as a tenant or for more than 12 years—Adverse possession.

It is open to the defendants, in the first place, to plead, that the lands were comprised in their tenancy and that consequently the plaintiffs were not entitled, to recover possession, and in the second place, to assert that if the tenancy was not established, as they had held possession for more than 12 years,

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August, 14.

* Appeal from Appellate Decree No. 119 of 1906, against the decision of E. Panton Esq., District Judge of Sarun, dated the 29th August 1905, reversing that of Babu Durga Prosad Ghose, Munsiff of Sarun, dated the 7th June 1906.

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the right of the plaintiffs to recover possession was extinguished by the law of limitation.

Denomonee Debia v. Doorga Pershad (1) followed.

When the case of the plaintiffs was that the defendants were tenants in respect of other lands not in dispute and that by act of trespass they came to occupy the disputed land within 12 years before suit, but it was proved that the defendants had been in occupation for more than twelve years, the title of the plaintiffs to recover possession by ejectment of the defendants was barred by limitation. The question is not one of adverse possession but of limitation.

Ishan Chandra v. Raja Ram Ranjan (2) followed.

Appeal by the Plaintiffs.

Suit for declaration of title and for recovery of possession.

The facts and arguments appear sufficiently from the judgment of the Court.

Babu Dwarka Nath Mitter for the Appellants.

Babus Akhoy Kumar Banerjee and Biraj Mohun Mojumdar for the Respondents.

The judgment of the Court was delivered by

Mookerjee J.—The subject matter of the litigation which has given rise to this appeal is a parcel of land about 1 bigha, 11 cottahs and 9 dhurs in area. The plaintiffs appellants allege that the disputed lands were their Khas Zerai, that the defendants who were raiyats in respect of a holding of 9 bighas, 2 cottahs and 8 dhurs of land obtained from the Settlement Officer an entry in the Record of Rights to the effect that the lands now in dispute formed the Zerai of the plaintiffs but were included within their holding, and that subsequently on the 29th May 1900, the defendant's forcibly and wrongfully took possession in spite of the opposition of the plaintiffs. On these allegations the plaintiffs asked for declaration of their title and for recovery of possession and mesne profits. The defendants respondents contended that as the disputed lands had not been in the khas possession of the plaintiffs either within the last twelve years, or at any time, the claim of the plaintiffs was barred by limitation; and they asserted in the alternative, that the lands were as a matter of fact comprised in their tenancy, so that, upon either view the plaintiffs were not entitled to obtain a decree for ejectment.

The Court of first instance made a decree in favour of the plaintiffs. Upon appeal that decision has been reversed by the learned District Judge. He has held that the plaintiffs have

(1) (1873) 21 W. R. 70 (F. B.) 12 B. L. R. 274 (F. B.)

(2) (1905) 30 C. L. J. 125.

failed to show that they were dispossessed, as alleged by them, at the time of the settlement proceedings, or they were in possession at any time within twelve years of the suit. In this view of the matter, the learned judge concluded that the plaintiffs must be taken to have failed to make out their case.

The plaintiffs have now appealed to this Court and on their behalf it has been argued that the defendants are not entitled to rely upon the plea of limitation as they plead tenancy under the plaintiffs, and that in any event the title of the plaintiffs to recover possession has not been extinguished by adverse possession on the part of the defendants.

As regards the first branch of this argument, we must hold that there is no foundation for it. It was laid down by a Full Bench of this Court in the case of *Deno Monee Debia v. Durga Pershad Mozumdar* (1), that in a suit for possession of land brought against a person, who set up a tenancy but is really a trespasser, the defendant merely by allegation of tenancy in his written statement does not preclude himself from setting up the defence of the law of limitation. Sir Richard Couch in delivering the judgment of the Full Bench observed that if the contrary view prevailed, in many cases it would be productive of the greatest hardship, inasmuch as the defendant would be obliged to relinquish the defence of the law of limitation where he might really have it, in order to be able to say, I believe that I can prove a tenancy between the plaintiff and myself and I desire to rely upon that. We must therefore hold that it was open to the defendants to plead in the first place that the lands were comprised in their tenancy and that consequently the plaintiffs were not entitled to recover possession, and in the second place to assert that if the tenancy was not established, as they had held possession for more than twelve years, the right of the plaintiffs to recover possession was extinguished by the law of limitation.

As regards the second branch of the contention of the appellants, it is in our opinion equally unfounded. The learned vakil for the appellants has suggested that inasmuch as the defendants set up tenancy rights in respect of lands other than those now in dispute, they are not entitled to plead limitation in answer to the claim of the plaintiffs. This view is opposed to the rule laid down by this Court in the case of *Ishan Chandra Mitter v. Raja Ramranjan Chakrabutty* (2). It was pointed out in that case that when a tenant takes possession of

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(1) (1873) 21 W. R. 70

(2) (1905) 2 C. L. J. 125.

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land outside his tenancy and professes to do so in his character as tenant, the landlord is dispossessed in a limited sense ; in other words, he is deprived of actual possession of the land but not of proprietary possession or possession by receipt of rent. In such a case Article 142 of the Second Schedule of the Limitation Act applies, and the landlord if he wishes to eject the defendant must bring his suit within 12 years of the dispossession. If he does not do so his title to recover possession is barred, although his title to receive fair rent is not barred, as the possession of the tenant, so far as the latter right is concerned, has never been adverse. Judged by this test the plaintiffs in the case before us are obviously out of Court. Their case as laid in the plaint was that the defendants were tenants in respect of land other than those now in dispute and that by an act of trespass they came to occupy the lands comprised in the present litigation ; they further asserted that this ouster took place within twelve years of the suit. That allegation, however, has not been established. It is clear therefore that the title of the plaintiffs to recover possession by ejectment of the defendants is barred by limitation. The learned vakil for the appellants suggested that as between a landlord and tenant, there can never be adverse possession. This proposition is undoubtedly too broad, but it is not necessary to consider now, how this statement should be qualified. It is enough to say for the purposes of the present case that the question which arises is really not one of adverse possession but of limitation, and what we hold is that the title of the plaintiffs to recover possession has been extinguished by the law of limitation. The defendants have not asserted adverse possession against the entire interest of the landlords ; the question of adverse possession might have arisen if they had done so. But their case as set forth in the first paragraph of the written statement is that inasmuch as the plaintiffs were not in possession within twelve years of the suit, their title only in so far as the right to recover possession is concerned, is barred by limitation. This view is obviously right. Reliance was placed by the learned vakil for the appellants upon the case of *Chaitan Singh v. Sudhari Monim* (1) in which it was ruled that acceptance of rent by the landlord creates the relationship of landlord and tenant between the parties and until that relationship is legally determined the landlord cannot dispossess the tenant ; possession of property by one party cannot be adverse to another within the

(1) (1905) 5 C. L. J. 62.

meaning of the Limitation Act unless the claims of parties are hostile and adverse to each other. That case is, however, clearly distinguishable. There the question arose in respect of the lands comprised in the tenancy held by one party under the other; here the question arises with respect to lands which are alleged by the plaintiffs to be outside the tenancy held by the defendants. It is clear, therefore, that the question of limitation does arise in respect of such lands.

The view taken by the District Judge is correct and his decree must be affirmed. The effect of this decision will be that the claim of the plaintiffs to recover possession will stand dismissed on the ground that it is barred by limitation. We do not decide, however, whether the disputed lands are comprised within the tenancy held by the defendants under the plaintiffs, and, if they are outside, whether the plaintiffs are entitled to claim additional rent for them. With these observations, the appeal is dismissed with cost.

T. M.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

ADIL MOHAMED AND OTHERS

v.

THE EMPEROR.*

Penal Code (Act XLV of 1860), Sec. 300 exception 4—Murder—Sudden fight—Private defence—Common intention—Sec. 149—Difference of effect.

When the accused's party pursued the complainants in three boats for a long distance and then when they had them in their power landed and attacked them with spears and killed three of them, their action does not come within section 4 to section 300 and certainly amounts to murder.

There is no right of private defence against persons who are merely taking refuge in the offender's land from other persons trying to take their lives.

Members of an unlawful assembly may have a common object only up to a certain point and the criminality of each varies according to the information he has and also to the extent to which he shares the community of object. The effect of section 149 may be different on different members of the same unlawful assembly.

Jahiruddin v. Queen Empress (1) followed.

Case of rioting with murder.

Appeal by the Accused Persons.

Criminal Appeal No. 404 of 1908 against the decision of P. E. Cammiade, Additional Sessions Judge of Sylhet, dated the 13th March 1908.

(1) (1894) 1 L. R. 22 Cal. 308.

CIVIL.

1907.

Raktoo Singh

v.
Sudhram Ahir.*Mookerjee J.*

CRIMINAL.

1908.

August, 14.

CRIMINAL.

1968.

Adil Mohamed

v.

The Emperor.

The material facts and arguments appear from the judgment, *Babu Atulya Charan Bose* for the Appellants.

Mr. Orr for the Crown.

The following judgment was delivered

This is an appeal from the judgment of Sessions Judge of Sylhet who agreeing with both the assessors convicted 6 persons of rioting under section 147, Criminal Procedure Code, and of murder by implication under section 302 read with section 149 and sentenced them to transportation for life.

It is common ground that in consequence of some dispute as to cutting grass at a place which, as far as we can see, the complainant's party probably had no business to cut it, they were pursued by the accused who apparently filled three boats, while the complainant only occupied one and fearing that they would be caught in a narrow *khal* they landed on the high land of Bima sankita to the south of the small Chipa *khal*, which is said to be only knee-deep. The accused party landed in the north-west of the same high land and pursued the complainant's party to the bank of this small *khal*. In the result three persons on the side of the complainant were killed outright and many others received severe and dangerous wounds with spears, the accused party receiving nothing but slight punctured wounds on their fingers etc., which the learned Judge has held to be self-inflicted.

The considerations which have been placed before us are that both parties went armed and prepared to fight and that their case should be treated under the fourth exception to section 300, Indian Penal Code, and the conviction of the principal offenders should be under section 304. It is further argued that both the lands where grass was being cut by the complainant and the land where the fight took place belonged to the accused's party and that there is the question whether they exceeded the right of private defence. Then there is the third question whether the case of the three accused who were not held to be ringleaders, and whom the Judge says he would have treated more leniently if he had the power to do so, can be differentiated from that of the others.

Taking these three points in order, we are clearly of opinion that the case cannot be brought within the fourth exception to section 300, Indian Penal Code. That exception refers to an act committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender

having taken undue advantage or acted in a cruel or unusual manner. Now in this case had the accused attacked the complainants' party when they were actually cutting grass to which they laid claim and a fight had ensued, the case would have fallen within the exception, but when they pursued them in three boats for a long distance and then when they had them in their power they landed and attacked them with spears and killed three of them deliberately, we cannot find that the act of those persons who committed homicide is less than murder.

As regards any right of private defence we consider that no such question can possibly arise. Supposing it is not quite certain, that the high land does not belong to the decree-holders in whose interest the accused were acting, there would be no right of private defence against persons who merely took refuge there from other persons who were trying to take their lives. We need not dwell upon this point.

As regards the third point we are of opinion that it is within our power to make the distinction which the learned Judge desired to make. It was laid down in the case of *Fahiruddin v. Queen Embress* (1), that "in dealing with such cases, while on the one hand it is necessary for the protection of the accused that he should not, merely by reason of his association with others as members of an unlawful assembly, be held criminally liable for offences committed by his association, which he himself neither intended nor knew to be likely to be committed, on the other hand it is equally necessary for the protection of the peace, the members of an unlawful assembly should not lightly be let off from suffering the penalties for offences for which, though committed by others, the law has made them punishable by reason of their association with the actual offender with one common object. These two cases respectively emphasize the necessity of keeping these circumstances in view. Members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of section 149 may be different on different members of the same unlawful assembly."

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We think that carrying out the learned Judge's express intention, we may hold that the use of spears by the members of the unlawful assembly can only saddle those three men who are said to have taken a prominent part in the occurrence with the inevitable intention of committing an offence under section 326, Indian Penal Code. Beyond this we cannot go. But we change the conviction on Saiyadulla, Kiamuddi and Asadulla to one under section 326 read with 149 and reduce their sentence to ten years' rigorous imprisonment which will be under the provisions of section 59, Indian Penal Code, transmuted to transportation for the same term. As regards Adil Mahomad, Faizulla, and Jabanulla, we agree with the Sessions Judge that they were ringleaders in the occurrence and we see no reason to interfere with the conviction and sentence in their case. With these modifications the appeal is dismissed.

N. K. B.

*Appeal dismissed.**Several sentences modified.*

CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

ABDUL RAUF MIA AND ANOTHER.

v.

RAHAMUDDI*.

Criminal Procedure Code (Act V of 1898), section 145—Proceedings, adjournment sine die—Legality.

It is not legal for a Magistrate to adjourn proceedings under section 145 of the Criminal Procedure Code *sine die*, pending settlement of the tract under Regulation VII of 1882.

Proceedings under section 145 of the Criminal Procedure Code.

Rule obtained by the 2nd. party.

The material facts appear from the judgment.

Babus Dasarathi Sanyal and Abani Bhusan Mukherjee for the Petitioners.

The following judgment was delivered by

Brett J.—We have heard the learned vakil in support of this Rule and nobody appearing to oppose it, we think it must be made absolute.

The order of the Magistrate dated the 3rd April 1907, postponing the proceedings under section 145 of the Code of Criminal Procedure, *sine die* and at the same time retaining the

* Criminal Rule No. 611 of 1908 against the order of A. J. Laive Esq., District Magistrate of Faridpur, dated the 22nd February 1908, confirming that of Moulvie Ahmadulla, Deputy Magistrate, dated the 3rd April 1907.

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property covered by those proceedings under attachment, is an order which he certainly had no jurisdiction to pass. The reasons given in the order itself for passing it are not in our opinion tenable. There is nothing whatever to show that the estate or area in which the land in dispute is situated is now under settlement by the revenue authorities under the provisions of Regulation 7 of 1822, and even if it had been,* the Deputy Magistrate does not appear to have followed the instructions contained in section 34 of that Regulation. We hold that the reasons given for postponing the proceedings under section 145 of the Code of Criminal Procedure *sine die* are bad in law. We therefore make the Rule absolute, set aside the order of the Magistrate and direct him to proceed under section 145 of the Code of Criminal Procedure and conclude the proceedings according to law.

N. K. B.

*Rule made absolute.**Before Mr. Justice Sharfuddin and Mr. Justice Cox.*

BHOM LAL CHOWDHURY

v.

MR. R. F. HOPCROFT AND OTHERS.*

European British subject—Criminal Procedure Code (Act V of 1898), sections 107, 443—Magistrate who may inquire.

The expression "inquire into or try any charge" in section 443 of the Code of Criminal Procedure applies to proceedings under section 107 of the Code.

The party against whom proceedings under section 107 of the Code of Criminal Procedure are instituted, is in the position of an accused person.

Queen Empress. v. Mupasoddi Lal (1) referred to

Application for Revision by Mr. Hopcroft.

Proceeding under section 107 of the Criminal Procedure Code.

The facts of the case and arguments appear sufficiently from the judgment.

Mr. Godfrey and Babu Haraprasad Chatterjee for the Petitioner.

The judgment of the Court was as follows:

This is a Rule on the District Magistrate of Muzafferpur to show cause why the case should not be transferred from the file of the trying Magistrate to that of any other Magistrate competent to try the same on the ground that the trying Magistrate had no

* Criminal Revision No. 1077 of 1909 against the proceedings instituted under section 107, Criminal Procedure Code of Mr. Rowland Chandra, Deputy Magistrate of Muzafferpur, dated the 29th August 1903.

(1) (1898) 1 L. R. 21 All. 107.

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jurisdiction to inquire into the matter under section 443, Criminal Procedure Code.

Under section 443, Criminal Procedure Code, no Magistrate, unless he is a Justice of the Peace, and (except in the case of a District Magistrate or Presidency Magistrate) unless he is a Magistrate of the first class and a European British subject, shall inquire into or try any charge against a European British subject.

From the explanation submitted by the Magistrate, there is nothing to show that the petitioner is not a European British-born subject, and we are told that the matter was not at all disputed. The question is whether the expression "inquire into or try any charge" applies to proceedings under section 107 or not.

The party against whom proceedings under section 107, Criminal Procedure Code, are instituted, is in the position of an accused party and when he is bound over to keep the peace, his liberty is, to a very great extent, qualified. In *Queen Empress v. Mupasoddi Lal* (1), it was held that a person against whom proceedings under chapter VIII of the Code of Criminal Procedure are being taken, is an "accused person" within the meaning of section 437 of the Code. It appears from this case that the learned Judge who had tried it, followed *Queen Empress v. Mona Puna* (2), and *Fhoja Singh v. Queen Empress* (3).

If, therefore, the petitioner is an accused person, his case certainly comes under section 443, Criminal Procedure Code, and, as a European British-born subject, he is entitled to claim that he should be tried by a Justice of the Peace or a District Magistrate or Presidency Magistrate, provided the Justice of the Peace is a Magistrate of the first class and a European British-born subject.

In the above circumstances, we make the Rule absolute and direct that the District Magistrate do transfer the case to any Magistrate competent to try the petitioner.

A. T. M.

Rule made absolute.

(1) (1898) I. L. R. 21 All. 107.

(2) (1892) I. L. R. 16 Bom. 661.

(3) (1896) I. L. R. 23 Calc. 493.